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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

REBECCA A. BOOSTROM,

Petitioner,

--v.--

STEPHEN BACH,

Respondent.

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SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

1. Is due process denied in a Small Claims court when Summary Judgement is granted when the court does not state it is hearing the Defendant's Motion for Summary Judgement, does not have oral argument,does not receive evidence, and asks only the defendant, an attorney representing himself, two questions in legal terminology about his allegations on the statute of limitations during the time the court stated it was hearing a motion filed by the Plaintiff, pro se.

2. Does the Indiana Supreme Court's first impressions opinion interpreting a Small Claims Rule to create a new requirement that paying a Small Claims filing fee is a prerequisite to commence a Small Claims action a denial of due process by lack of notice of the law by rule to unrepresented Small Claims plaintiff(s) who follow all the many detailed requirements in said rule.

LIST OF PARTIES

Petitioner:

Rebecca A. Boostrom

Respondent:

Stephen C. Bach

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REFERENCES TO OPINIONS BELOW

The opinion of the Indiana Supreme Court is found at 622 N.E. 2d 175 and J.A.3-13 and J.A. 14.

The opinions of the Indiana Court

of Appeals are found at 589 N.E. 2d 275 (J.A. 15-23) and 603 N.E. 2d 867 (J.A. 24-33).

The Small Claims courtroom ruling is found at J.A. 34-35, and entry of summary judgement, supplied, at J.A. 36-38.

GROUNDS OF JURISDICTION

The opinion of the Indiana Court of Appeals was rendered on April 6, 1992. The opinion of the Court of Appeals on the petition for rehearing was rendered on November 23, 1992. J.A. .The opinion of the Indiana Supreme Court was rendered on October 26, 1993. J.A. . The Indiana Supreme Court denied (a) the Petition for Rehearing without an opinion, on February 23, 1994.

This Court has jurisdiction under 28 U.S.C. § 1254 and § 1257.

CONSTITUTIONAL ARTICLE INVOLVED

This case involves the United States Constitution, Fourteenth Amendment, article 1. J.A.

STATEMENT OF THE CASE

No appeals opinion in the Indiana appellate courts has considered the question of the lack of due process of no hearing on Mr. Bach's Motion for Summary Judgement prior to entry of summary judgement. The Court of Appeals used statutory construction to interpret the Small Claims statutes and rules in its opinion that the rules did not give notice of any law about a filing fee in Small Claims, but the Indiana Supreme Court vacated their opinion and did rulemaking of added a requirement of a filing fee within its opinion.

In the lower court, Ms. Boostrom raised the question of lack of due process of notice of the law by arguing that Indiana T.R. 3 does not state a filing fee is required, and tried to present a prominent Indiana law authority of Indiana Forms of Pleading and Practice which stated that a filing fee was not a prerequisite to commencement of an

action, and she stated she knew from experience that the law allowed a filing fee to be paid late in the Court of Appeals and the Indiana Supreme Court.

The lower court denied her "Motion to Correct Minutes" of the filemark date of the complaint for the reasons that she knew the "rules" required a filing fee because she had paid filing fees previously. The court did not address in its ruling or entry the key question of law of whether the law required a filing fee to be paid as a prerequisite to filing a complaint, and where in the law that the average unrepresented Small Claims plaintiff was informed of any such requirement controlling the filing of a complaint or if the Small Claims plaintiff was informed of the consequences of late payment of a filing fee.

In the lower court, prior to entry[1] of

[1] The Defendant Bach himself pro se composed the subsequent written "Entry of Judgement."(Transcript,Record,p. 117, ln. 11-14; "Second Motion to Correct Error,"Exhibit A,Record p. 52-53; Record, p. 54); Docket of June 4, 1990, Record,p.69. Ms. Boostrom had no time allowed to

summary judgement, Ms. Boostrom had no opportunity to raise an objection to the lack of due process of no hearing on Bach's Motion for Summary Judgement. During the hearing of June 4, 1990, Ms. Boostrom was unable to know the court would not have a due process hearing on Bach's motion prior to its ruling, but ask Bach only two questions in legal terminology about his motion.

The Plaintiff filed a Motion to Correct Error, which was unrequired by Indiana law in 1990, and it was denied without an opinion. R. 40-42.

In the Indiana Court of Appeals, Ms. Boostrom continued the issue of lack of due process of a required hearing in her *Appellant's Brief*, Issue No. 2.[2] In the

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object to the submitted entry. Following prior local custom, the judgement was backdated to the hearing date.

[2] Appellant's Brief, Ind. Ct. of App., reads:"Issue No. 2
The lower court erred by law, by procedure, and by irrefutable evidence of the transcript that can only lead to one conclusion that the court erred in granting summary judgement without a hearing on the Motion for Summary Judgement and filed Responses, and

Appellant's Reply Brief, pp. 5-14, she replied to Appellee's Issue No. 1 on the grounds of lack of due process of a hearing. Ms. Boostrom continued the issue of lack of due process of notice of a requirement of a filing fee to commence an action in her Issue No. 1 with which the Court of Appeals agreed. Opinion J.A. 15-23.

The Court of Appeals explained why it was not giving an opinion on all[3] of Ms. Boostrom's issues as required by Indiana law. Thereafter, in the Indiana appellate courts, the issue of lack of due process of a hearing on Bach's motion prior to summary judgement was not addressed in an opinion.

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for granting a Motion for Summary Judgement in Small Claims court while a Motion to Transfer to the Superior Court was pending."

[3] "Issue": "Boostrom presents three issues for our review; however, because we reverse, we only need to address the following :

Did the trial court err when it refused to order that the Complaint, which was not accompanied by a filing fee, be file-marked the date of its certified mailing?" (Boostrom vs. Bach, Court of Appeals, 1992, 589 N.E. 2d 275 at 276)

In response to Bach's Petition for Rehearing, the Court of Appeals in its dicta supported its prior dicta that two motions were heard without addressing the issue of lack of due process hearing. J.A. 24-33.

In the *Appellant's Brief in Opposition to Transfer*, Ms. Boostrom argued again the prior issue of lack of a due process hearing and incorporated by reference her prior argument: in response to Bach's Issue A (App. Br.pp. 2-3); and in response to Bach's Issue No. B (App. Br., pp.4-5).[4]

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[4] The relevant portions read:
"Ms. Boostrom was not allowed to give all her reasons for not wanting the court to hear the 'Motion for Summary Judgement,' but only to indicate a Petition for Transfer was pending. The Appellant incorporates as her authority the Record of the transcript and incorporates all her prior documentation of quotes from specific parts of the transcript showing that the court only heard the 'Motion to Correct Minutes.' These quotes from the transcript in the Record are found in the Appellant's Brief (first brief) to the Court of Appeals under Issue No. 2, pages 12-16, and also in the Appellant's Reply Brief to the Court of Appeals in reply to Appellee's Issue No. 3, with quotes from the transcript found on pp. 5-14 of the Appellant Boostrom's Reply Brief to the Court of Appeals." (*App. Br. in Opposition to Transfer*, p. 2-3)...

"The lower court, however, never conducted a hearing of the issue of the statue of limitations for the Plaintiff-Appellant to present an oral argument or evidence regarding when the statute of limitations would expire or what statute applied.

"The transcript (Record, 71-117) presented irrefutable proof that can only lead to one conclusion

The transfer Opinion of the Indiana Supreme Court did not address the issue of lack of a full adversarial hearing of Bach's Motion for Summary Judgement in affirming the grant of summary judgement while addressing only the question of whether the filing fee in Small Claims controls the statute of limitations. J.A. 3-13.

The Appellant timely filed an "Appellant's Petition for Rehearing of the Petition to Transfer" and raised the question of lack of due process of notice of a requirement of a filing fee in Small Claims in numbered paragraphs Nos. 8, 9, 10, 11, 12, 13, and raised the question of lack of due process of a hearing on Bach's motion for full adversarial argument on the accrual date

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that after the Judge Pro-Temp announced he would hear the "Motion to Correct Minutes," he only heard evidence regarding the file-mark date of the complaint and never announced he was going to hear the Motion for Summary Judgement"....

"Only the question of the file-mark date of the complaint was fully adjudicated after the Small Claims court announced he would hear a 'Motion to Correct Minutes' and prior to when he gave his ruling.'" (*App. Br. in Opposition to Transfer*,pp. 4-5).

and the statute of limitations in Nos. 14, 15, 16, and showed the merit of argument she should be able to present if a due process hearing was held in No. 17, 18, 20.

While the Petition for Rehearing Transfer was pending, Ms. Boostrom filed a "Petition to Accept a Late Brief of More than Fifty Page" and tendered *Appellant's Brief in Support of Her Petition for Rehearing of Transfer*. According to amended appellate rules in Indiana, her petition could have been granted, especially because she was proceeding pro se, was a graduate student, working, and been sick. Said brief was "received" but not "filed" and considered.

Also, while the Petition for Rehearing transfer was pending, Ms. Boostrom had filed Appellant's Motion to Supplement the Record of the Proceedings for Petition for Rehearing Transfer[5] for a legible copy of the

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[5] The appellant, pro se, followed the Indiana custom to tender a one volume of a supplement to the Record of certified copies of Orderbook entries with her motion to supplement the Record. This supplement was important (1) to file a legible copy of the Withdrawal order entered February 19, 1988 (2) a

withdrawal order and copies of orderbook entries showing a local custom (now extinct) then existed whereby Ind. T.R. 72(D) was not followed in Vanderburgh courts.

The Indiana Supreme Court did not rule if it would supplement the record or accept a late brief permissible by law.

Then, the Indiana Supreme Court denied Ms. Boostrom's petition for rehearing without an opinion. J.A. 14.

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legible copy was important for readability of the "Received Feb 19, 1988 County Clerk" stamp of the Clerk of the Court because this stamp showed that the nunc pro tunc entry was not done due to clerical delay, because the clerk filed it in the orderbook the same day received. Instead, the nunc pro tunc entry followed a local custom contradictory to T.R. 72 (D) to backdate all entries of orders and judgements to the date of the hearing.

On February 1, 1994, Bach filed a response to her motion to supplement, wherein Bach acknowledged that such a local custom of backdating all orders and judgements by nunc pro tunc stamps to the dates of hearings existed at that time in Vanderburgh courts.

The supplement of certified orderbook entries from the underling cause and this cause showed such a local custom was habitually done 45 years after Ind. T.R. 72 (D) was amended. Now T.R. 72(D) is followed.

This supplement was important to show Bach's alleged accrual date of January 19,1988 could not have been even an arguable accrual date because the clerk did not receive until February 19, 1988 the order for withdrawal, and it was entered the same day on February 19, 1988. The nunc pro tunc backdating received a due process hearing, but none was held, and the docket didn't show Ms. Boostrom was informed of the order.

This case originated in the Small Claims court as a malpractice case against Stephen Bach, attorney, by his former client, Rebecca Boostrom, who proceeded pro se, for breach of a representation contract to represent her in a then pending Vanderburgh Superior Court Cause No. 85-CIV-748 (R. 140 Docket in underlying cause). At the time this Small Claims complaint was filed in early 1990 (R 3-6), and from the prior January 1989 onward, Ms. Boostrom has had no attorney to represent her in said Vanderburgh County Superior Court cause, now in appeal (R, 138-140, docket in underlying cause).

In December, 1984, when Mr. Bach began to advise Ms. Boostrom, and on February 10, 1985, Attorney Stephen Bach, with co-counsel Russell Armstrong, signed a contingency fee representation contract with Rebecca Boostrom to represent her in litigation.(R 4-5, Complaint, Contract of Representation).

On July 5, 1985 then co-counsel Bach and Armstrong acting on behalf of Ms.

Boostrom filed a damages action against the Title Insurance Company of Minnesota for breach of contract and Ray L.Clark and Barbara D. Clark, for trespass and conversion of real property and income therefrom, in Vanderburgh Superior Cause No. 85-CIV-748. R 132, Complaint for Damages (R 142-149 and Paragraph II (R 150-152).

On November 7, 1986, a decision to grant summary judgement to said title insurer was granted after Bach filed no response for his client, but no judgement entry was made in the orderbook. (R. Docket, 133).

On January 12, 1988, said Defendants Clark in 85-CIV-748, filed seven motions to dismiss/for summary judgement of conversion, punitive damages, and damages, and the third scheduled trial date was vacated.(R. 135-136).. One week later, on January 19, 1988, Mr. Bach and his co-counsel filed to withdraw from representation. Said motion was heard the same hour and the court made a decision approving withdrawal.R. Docket,

p.135-136).

On February 19, 1988, the order approving withdrawal was entered in the orderbook.(R. 131). The "received Feb 19, 1988 County Clerk" stamp of the clerk on the original is illegible on the copy Bach filed. (R 131). The docket does not show Ms. Boostrom was notified of a nunc pro tunc entry (Docket, Record, 136).

In said the pending underlying damages action, Vanderburgh Superior Cause No. 85-CIV-748, the said Clarks filed many motions on the issue of res judicata due to a prior quiet title action in which Attorney David Hatfield has represented Ms. Boostrom. The motions and rulings on said issue of res judicata between the quiet title action and the damages action are represented in the docket entries of 9-5-85, 9-12-86, 11-3-86, 11-7-86, 1-5-87, 3-26-87, 1-12-86, 5-6-88, 5-9-88, 7-28-88, 11-10-88, 2-15-88 , 6-9-89, 6-23-89, 6-27-89, 2-26-90(R, 132-140). The 2-15-89 motion for summary judgement on res

judicata was pending awaiting appointment of a special judge in early 1990 when Ms. Boostrom, without representation in said underlying cause, sued Mr. Bach for breach of representation contract.

The allegations of malpractice and breach of contract against Ms. Bach are in the complaint (R 3-6) and More Detailed Statement (R 12-22). Since 1989, Ms. Boostrom has been without representation in said underlying cause, now in appeal. Her teaching career and alternate academic degree plans have been interrupted for years now by needing to study law on her own to represent herself pro se in the underlying cause.

REASONS FOR REVIEW

The Indiana Supreme Court's opinion denies due process of notice of the law governing and controlling the substantive rights of unrepresented Small Claims plaintiffs

because: (1) there is no published Small Claims rule that states a filing fee is required or when or why ; Cf. Ind. Sm. R. 2, J.A. 73 ; (2) the Vanderburgh Superior Court, Small Claims Division, prior to 1994 did not publish a Small Claims Manual as required by Ind. Sm.C. R 13, J.A. 75 ; (3) the Vanderburgh Superior Court, Small Claims Division, local rules for Small Claims, do not require a filing fee; (4) Indiana Statute,I.C. § 33-11.6-4-6, states that the procedure for Small Claims shall be "established by rule," not by caselaw creating a requirement, in simple language so "any person" can file and proceed in a case unrepresented ; (5) the Indiana Supreme Court composes the Small Claims rules and did not amend prior to or after their opinion in this cause to state a filing fee was required;

(6) "any person" in Small Claims cannot find law books or know how to read them;

(7) the Small Claims statute does not state a

filing fee must be paid prior to filing a complaint and the definition of clerk does not include the clerk for the Small Claims court of this case; (7) the Respondent relied on a statute for only Marion County (seat of the capital) in this Vanderburgh County case, and did not find and cite a caselaw, a rule, or a statute for Vanderburgh County Small Claims, so how could an unrepresented person be expected to know one; (8) the Indiana Court of Appeals gave an opinion there was no rule, statute, or law requiring a filing fee prior to commencement of an action, so how could an unrepresented Small Claims party know any different law than the Court of Appeals used; (9) the first impressions opinion of this case requiring a filing fee to commence an action will be hidden away in a law library, and will be unavailable to typical unrepresented Small Claims plaintiffs, and the rulemaking of this new interpretation denies due process of notice by an easy-to-read rule readily

available to Small Claims unrepresented persons; (10) the opinion of the Indiana Supreme Court on its Small Claims Rule 2 (a) overlooks its own description of the multiple requirement for commencement of an action found in part (b) of the same rule, and is contrary to statutory construction law that the plain and clear language of a rule cannot be changed by adding elements to a rule not found therein, especially when the legislature has a statute the procedure shall be by simple rules easy to understand and to follow by unrepresented persons.

Furthermore, this Indiana Supreme Court's opinion is putting two more stringent requirements of paying the filing fee and filing the summons as a prerequisite to commencement of an action in Small Claims than is found in existent caselaw and Indiana authority for commencement of an action under T.R. 3 for Superior court cases. Unrepresented persons should not have stricter requirements than represented person

for equal access to the courts and so wealth discrimination does not operate in Small Claims courts.

The question for review is important to society because the law has greatly protected the rights of indigents and prisoners, but now more focus in the law should be turned to the small claims of working people who may work double to twenty times as many hours for the same amount of money as others. Their constitutional right to a substantive law hearing of their substantive rights should be protected by literally applying the simple, plain English rules (especially when easily readable rules are required by statute as in this cause) designed to guide them to their access to the courts for redress of any injustice and monetary recompense needed for their livelihood.

Can this right of free access to the courts of justice be altered by a form of wealth discrimination seen in how Small Claims litigants without counsel are barred

from using the court system for the lack of clear Small Claims rules?

This Petitioner asks the United States Supreme Court to expand its concept of "wealth discrimination" and " [A] century of Supreme Court adjudication under the Equal Protection Clause" discussed in *San Antonio Indian School District v. Rodriguez, 411 U.S. 1* 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) and to apply an expanded concept of "wealth discrimination" to Small Claims courts where "wealth discrimination" can cause an unrepresented party to be unable to find, to understand, or to follow caselaw and statutes, while the same person, if literate, would be able to follow readily available clear, easily understood, and simple Small Claims rules of court reprinted in a Small Claims court manual available in the Clerk's office.

2. The Indiana Supreme Court has erred in its opinion to uphold a summary judgement

for Bach, an attorney representing himself, without a hearing on his motion. A motion for summary judgement requires a due process hearing. Setting Bach's motion to be heard is not a substitute for a full adversarial hearing of his motion. In Small Claims, by rule, all defenses are preserved without a written response. Ms. Boostrom filed three responses, but all the courts have never addressed two of her filed responses. The Small Claims rules have no explanation for how the unrepresented person can defend himself/herself against a motion for summary judgement filed by a lawyer, and therefore the Small Claims court must guide an unrepresented person in how to present defenses, even defenses unknown as legal defenses to unrepresented parties.

In this case, court stated it was hearing Ms. Boostrom's Motion to Correct Minutes, heard oral argument on her motion and received exhibits into evidence on her motion, and ninety-nine percent of the

transcript is on her motion or extraneous matters. During the hearing of her motion, the court interrupted her presentation of a standard Indiana authority stating filing fees could be paid late to perfect a complaint in order to ask the defendant, an attorney, technically phrased questions about his allegations on the accrual date and the statute of limitations. The court controlled the discussion and the court did not ask the plaintiff the same questions either in plain English or in legal terminology. When the defendant attempted to self-initiate a presentation of his motion, the plaintiff objected and her objections were sustained by the court each time or else the defendant himself got back on the subject of the plaintiff's motion being heard. Finally, at the end of the hearing on Ms. Boostrom's motion to correct minutes of the filemark date of the complaint, the court stated affirmative agreement to Ms. Boostrom's request that Bach's motion for summary

judgement would not be heard until after a ruling was made on her motion to correct the minutes of the filemark date of the complaint. J.A. 40-71.

The court never stated on June 4, 1990 that it was hearing the Motion for Summary Judgement, never heard oral argument, and never received any exhibits into evidence on Bach's motion. When the court interrupted Ms. Boostrom's presentation of Indiana authority on the filing fee to ask Bach a question, she had reason to believe the court interrupted ner in order to know how much time and argument to hear on her motion by a preview of the weight of the ruling on her motion with regard to Bach's allegations in his motion. She had no way of knowing that the court would not hear Bach's motion, would never ask her the same questions it had asked Bach, and would rule on his motion after asking Bach only two questions phrased in very legal terminology the ordinary person cannot understand, including Ms. Boostrom at

that time in 1990.

Armstrong v. Manzo 380 U.S. 545 at 552 states: "A fundamental requirement of due process if the "opportunity to be heard. *Grannis v. Ordean, 234 U.S. 385."* Summary judgement are not "appropriate 'where motive and intent play leading roles." *Poller v. Columbia Braodcasting System*, 368 U.S. 464. Pp. 259-261" *White Motor Co. v. United States*, 372 U.S. 253 at 253.In *United States v. Continental Oil*, 377 U.S. 161 was remanded after there was no hearing and when no specific findings were made.

With the current growing popularity of motions for summary judgement in Small Claims courts by parties able to afford counsel, the lack of a due process hearing of a motion for summary judgement against unrepresented parties is an important question for review.

It is the right of a U.S. citizen "to come to the seat of government to assert any claim he may have upon that government, to

transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to the seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several states." *Crandall v. Nevada, 73 U.S.* 35, 18 L. Ed. 745.

The Indiana Supreme Court gave a new first impressions interpretation of law that three documents: Filing Fee, Summons,and Complaint in Small Claims are "necessary to commencement of her action" (Op. Cit., p. 6).

A plaintiff cannot "control" when the rules don't inform him/her how to "control the presentation of documents or what documents to

present or when or why. The Indiana Supreme Court or the legislature "controls" what is to be presented for commencement of an action by the plain and clear wording they should use in composing rules or statutes. The Indiana Supreme Court should not require more in this one case than what the small claims rule specified requires. The Court of Appeals used statutory interpretation to apply as written the Small Claims rules and Indiana Small Claims statutes, and therefore opinion was *not* a new interpretation of law, but merely an application of law as written:

> "[2] Here, the Complaint should have been filemarked the date it was sent by certified mail--January 12, 1990. There is no statute, rule or case law stating that filing fees must be paid in small claims courts before complaints will be filed.
> (Boostrom vs. Bach, 589 N.E. 2d 275 at 277)

Attorney Bach, Appellee, likewise in his Issue D, Transfer Brief, cited no caselaw, no statute for Small Claims (except one for Marion County exclusively), no rule, and no authority that stated that filing fees must be paid to commence an action. Yet transfer was

granted on his Issue D, not on any other issue Bach presented. Because Bach could find no authority in contradiction to the Court of Appeals' statutory application of the laws already written, no small claims plaintiffs should be required to know law Bach could not find and cite. The Indiana Court of Appeals opinions were based on the constitutional concept of due process of law by notice of the law, i.e., a person cannot be required to pay a filing fee to commence an action if there is no statute, no rule, and no law stating that paying a filing fee is a prerequisite to filing a complaint. Any person (as Ms. Boostrom) cannot be required to do something more than what the law gives notice it requires.

To be noted, the Indiana Supreme Court acknowledged in its opinion (supra) that the complaint was "filed" on January 12, 1990. It used the very technical word "filed" (in the past tense). This technical word "filed" is also found in T.R. 3: " "A civil action is

commenced by filing [emphasis added] a complaint with the court or such equivalent pleading or document as may be specified by statute."

"I.C. 1-1-4-1
Section 1. The construction of all statutes of this state shall be by the following rules, unless the construction is plainly repugnant to the intent of the legislature or of the context of the statute:
(1) Words and phrases shall be taken in their plain, or ordinary and usual, sense. Technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import. West's Indiana Code (1993)

Indiana's Trial Rule 3 states:

"A civil action is commenced by filing a complaint with the court or such equivalent pleading or document as may be specified by statute." T.R. 3

For Superior Court cases, T.R. 3 is to have a "literal" interpretation in Indiana: Geiger and Peters, Inc. v. American Fletcher National Bank & Trust Co., Ind. App. (1981):

"The plain wording of T.R. 3 is that the filing of a complaint or equivalent pleading commences an action. The Indiana Supreme Court has held "[i]n adopting the rule [T.R. 3] we effectively adopted the Federal rule...and in so doing, we adopted the

construction which the Federal Courts have placed on the rule." [citations omitted] *State ex rel Long v. Marion Superior Court Civil Division* [1981] Ind., 418 N.E. 2d 218, 219. Hence we look to the federal case law for assistance in determining whether the statute of limitations is tolled by the filing of a complaint.

[2] Literal compliance with T.R. 3 by filing a complaint commences the cause of action and is sufficient to toll the statute of limitations. [emphasis added] [citations omitted]

(*Geiger and Peters, Inc. v. American Fletcher National Bank & Trust Co.*, Ind. App. (1981), 428 N.E. 2d 1279 at 1282)

The Indiana Civil Code Study Commission's idea of "one rule" needs attention. "One rule" (i.e, T.R. 3) now applies to the commencement of various kinds of actions at various jurisdictional levels in the judicial system. One example used above was a "judicial review of administrative actions" "initiated by pleadings denominated by other names" originally commenced under T.R. 3 at the appellate level, not at the lower court level. A new action is commenced under T.R. 3 at the Indiana Supreme Court level, not initially in the lower court, by filing

a "certiorari from decision of board of zoning appeals" (a "document as specified by statute" about zoning appeals). " One rule, therefore, will apply to all such court proceedings except criminal cases" (Ibid.).The "one rule" for commencing an action at all levels of jurisdictions is applicable due to the amendment of Rule 2--ONE FORM OF ACTION (s) There shall be one (1) form of action to be known as "civil action." (Laws of the State of Indiana, 1967, Chapter 191, p. 546). Because there is now "one rule" (T.R. 3) for "commencement of an action," then it follows in reasoning that if the filing of a petition for judicial review in the Indiana Supreme Court (without the timely payment of the filing fee) tolls the applicable statute of limitations, then likewise, the filing of a similar complaint or document (without prepayment of a filing fee) will also toll the applicable statute of limitations in the other courts.

The Indiana Supreme Court has already decided that the untimely payment of the required appellate filing fees will not preclude the timely commencement of an action initiated under T.R. 3 in the Court of Appeals or in the Indiana Supreme Court.

The intention of the legislature reflected in the "one rule" comments of the Civil Code Study Commission should be now honored and heard in a due process hearing. Why should this clearly stated concept of "one rule" for initiating commencement of an action at all jurisdictional levels by the filing of a grievance be negated by interpreting T.R. 3 radically differently for the lower courts than it is interpreted for the appellate courts? The instant Court of Appeals' applied this "one rule" for commencement of an action at all levels of jurisdiction in Indiana in their reasoning.

"Moreover, while there are no cases directly on point, we find to be instructive the case of Brady v. Eastern Indiana Production Credit Association (1978), Ind., 396 N.E. 2d

335. There, the record for the appeal was timely filed, but the filing fee was late. Consequently, the appeal was dismissed. On transfer, the dismissal was reversed by the Indiana Supreme Court, which stated as follows: It is hereby directed that the case of Brady v. Eastern Indiana Production Credit Assoc. (1977), Ind. App. 360 N.E. 2d 1267, be remanded to the Court of Appeals for consideration of the merits. This Court finds the reasoning of the dissent more in line with our stated policy to reach the merits of a case whenever possible. Additionally, this court relies on the case of Peters et al. V. Poor Sisters of Saint Francis Seraph of the Perpetual Adoration Society, Ind. (1971), 257 Ind. 360, 274 N.E> 2d 530, wherein this Court, under the former transfer filing fee statue, held the untimely receipt of the fee by the Clerk was not grounds for dismissal where the petition to transfer was timely filed. Thus, in applying the reasoning of Peters, supra, to this case we believe the untimely payment and receipt of the filing fee should not be grounds for automatic dismissal where the record is timely filed, as here. Brady, 396 N.E. 2d at 335 [citations omitted].
"We also note our decision here is supported by case law in other jurisdictions."
(Boostrom vs. Bach, 589 N.E. 2d 275 at 277)

Prior to when Federal Rule 3 was adopted, Indiana law had clearly referred to the different components of commencing an action:

> "A civil action shall be commenced by filing in the office of the clerk a complaint, and causing a summons to issue thereon; and the action shall be

deemed to be commenced from the time of issuing the summons***.' Burns', 1946 Repl. § 2-802 (Jensen v. Fagan, Ind. App, (1964), 199 N.E. 2d 716 at 717)

When Federal Rule 3 was adopted in Indiana in 1970, if the then Indiana Supreme Court had wanted the filing of the summons and the filing fee to be prerequisite for the commencement of an action, the Supreme Court or the legislature had a chance to control the documents, but did not.

"In construing a statute, words should be accorded their plain and ordinary meaning. Trustees of Indiana University v. County Department of Public Welfare of Kosciusko County, (1981) Ind. App. 426." Barr v. Sun Exploration Co. Inc. v. Barr, Ind. App. (1982) 436 N.E. 2d 821.

Previously unconsidered is a practical "how to do it" comparison between a great authority in law, William F. Harvey, and a Small Claims unrepresented plaintiff. If William F. Harvey did not include a "step" to pay a filing fee and a "step" to file the summons in his steps for what to do for

the "commencement of an action, the Indiana Supreme Court is making an unreasonable requirement of any Small Claims unrepresented plaintiff when the Small Claims rule doesn't state what to do.

William F. Harvey in Indiana Practice has a practical step-by-step what to do procedure of closely following Superior Court T.R. 3 and T.R. 4. In Harvey's close reading of the trial rules, this foremost legal authority on Indiana law does not state in any step[1] that either (1)the filing fee and/or (2) the summons have to be filed to commence an action. These two filings are not stated. Harvey is faithful to the wording of Trial Rule 3; therefore, he omits those steps in his step-by-step listing of what is to be done to follow Rule 3.

Also, in 3.4 Additional Thoughts at the Commencement of an Action,[2] Harvey adds no "additional thoughts" about any payment of the filing fee or filing of the summons to

commence an action, but remains as silent. He has remained silent because the rule makes no requirement of paying the filing fee or filing the summons to commence an action. Also, no statute or caselaw has made that requirement.

Likewise, in Harvey's chapter of "Trial Rule 4: PROCESS," there is nothing in this chapter about any requirement to pay or anything about payment of the filing fee. Also, under Trial Rule 4, Harvey does not ever state or ever imply that filing the summons commences the action.

Harvey's discussion[3] of commencement of the action is all under T.R. 3. 1 William F. Harvey, Indiana Practice 71-79 (2d ed. 1987).

Furthermore, the Small Claims rules say nothing about "filing fee" or "summons," and so filing them should not be a prerequisite to commencement of a Small Claims action.

Also, if unrepresented Small Claims

plaintiffs could not know an issue never defined in a rule. As Kenneth M. Stroud, Professor of Law, and James W. Torke, Professor of Law, Indiana University School of Law--Indianapolis stated in Indiana Forms of Pleading and Practice (1990), in their analysis of "Commencement of Action":

"[2] Under Federal Rule 3 there is a split in authority as to whether an action is properly commenced without payment of the filing fee, but the **more recent cases hold that payment of the fee is not required for the action to be commenced. Indiana courts should follow the example of the more recent federal cases.**" (Trial Rule 1, Federal Rule 3.06, Indiana Forms of Pleading and Practice.)

3.07 When is a Complaint "Filed" with the Court?

"Trial Rule 5 provides that the filing of pleading and papers with the court " as required by these rules" shall be made by:

(1)...[in person]
(2) mailing the papers to the clerk by registered or certified mail return receipt requested (in which case filing is complete upon mailing) or
(3)...[with judge]

The federal courts have been liberal in their construction of what constitutes sufficient delivery to the clerk for the purposes of filing **in order to avoid harsh results such as the running of the statute of limitations.**" [emphasis

added] (Trial Rule 1, Federal Rule 3.07, Indiana Forms of Pleading and Practice.)

Under Federal Rule 3.08, Trial Rule 1 in Indiana Forms of Pleading and Practice:

> "As noted above an action should be deemed "commenced" when the complaint is filed with the clerk **even though summons has not yet been issued or the filing fees paid**. [emphasis added] What then if a plaintiff refuses or fails to cause summons to be issued to pay the filing fees within a reasonable time after filing the complaint? Under Trial Rule 41, the court is empowered to dismiss the complaint for failure of a party to prosecute the action, comply with the rules or with any order of the court."(Indiana Forms of Pleading and Practice, Trial Rule 1, Federal 3.08).

If the Indiana Supreme Court had wanted to require that the summons be filed on the same date the complaint is filed, it has had the power to create that requirement by amending T.R. 3 and T.R. 4 and also amending the Small Claims rules and publishing in advance its new rules. This Small Claims case is not the appropriate forum for a first impression opinion or commencement of an action because the vast

majority of Small Claims parties never read caselaw. The Small Claims is not governed by the rules of civil procedure, but by the law of substantive justice and "simplified procedure ...established by rule" I.C. § 33-11.6-4-6"So any requirement in the rules must be as readable as paying utility bills. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.ED. 2d 30 (1978).

The Indiana Supreme Court can order that the pre-printed form for the Small Claims complaint, and the Small Claims rules contain a notice to all plaintiffs about when they must pay the fee for court costs, and that the case will be automatically terminated if it is not paid by so many days after the complaint is filed. Then, if the court costs has not been paid within a reasonable time, a specific notice of "threat of termination" under T.R. 41 can be sent to the plaintiff ordering that the fee must be paid for the

case to proceed, as when utilities are shut off.

Adequate notice of the law by Small Claims rule and court notice during proceedings warning of dismissal will protect the Small Claims plaintiffs investments often made from hard-earned low wages.

Statutory interpretation was used by the Indiana Court of Appeals:

> "Furthermore, the rules clearly state that parties should be able to represent themselves in small claims courts. As noted in **I.C. § 33-11.6-4-6, ' A simplified procedure shall be established by rule to enable any person to file the necessary papers and present his case in court** either to seek or to defend against a small claim **without consulting or being represented by an attorney.'**" (Boostrom vs. Bach, 603 N.E. 2d 867 at 869) [Emphasis added]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 25, 1994

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OFFICE OF THE CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

REBECCA A. BOOSTROM,

Petitioner,

--v.--

STEPHEN BACH,

Respondent.

JOINT APPENDIX

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE UNITED STATES

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APPENDIX A

Constitution of the United States
AMENDMENT 14

§ 1. Citizenship - Due process of law - Equal protection. -- All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction of the equal protection of the laws.

United States Code

U.S.C.§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before of after rendition of judgement or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, ch. 646, § 1, 62 Stat. 928; June 27, 1988, P.L. 100-352, § 2(a), (b), 102 Stat. 662.)

U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute or the United States is drawn in question on the ground of its being repugnant to the Constitution or the treaties or is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.(June 25, 1948, ch. 646, §1, 62 Stat. 929; July 29, 1970, P.L. 91-358, Title I, Part D, Subpart 2, § 172(a)(1), 84 Stat.590; June 27, 1988, P.L. 100-352, § 3, 102, Stat. 662.)

APPENDIX B

FILED: October 26, 1993

OPINION ON TRANSFER

SUPREME COURT OF INDIANA

No. 82S04-9310-CV-1177

Transfer from No. 82A04-9008-CV-372
in Court of Appeals

REBECCA BOOSTROM,
Appellant (Plaintiff Below),

v.

STEPHEN BACH,
Appellee (Defendant Below).

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
SMALL CLAIMS DIVISION
The Honorable Donald R. Vowels,
Judge Pro Tempore
Cause No. 82D06-9002-SC-819
On Petition for Transfer

SHEPARD, Chief Justice.

We grant transfer to consider whether the statute of limitations is tolled when a complaint is tendered to the clerk, but the prescribed filing fee is not. We hold that

it continues to run. Appellant Rebecca Boostrom attempted to commence an action in small claims court against her former attorney Stephen Bach on January 12, 1990, the same day the statute of limitations was to run on her right of action. Boostrom mailed her complaint to the clerk of the Vanderburgh Superior Court by certified U.S. Mail return receipt requested. She did not include the small claims filing fee. When Boostrom's complaint was received, the clerk did not file-mark it. Instead, the clerk dispatched a letter to Boostrom on January 17th informing her of the need to remit the fee. Boostrom complied on February 5th, and her complaint was file-marked as of that date.

Defendant Bach moved for summary judgment, arguing among other things that Boostrom's action was barred by the statute of limitations. Boostrom responded with "Motion to Correct Minutes" whereby she sought to have her complaint marked as having been

filed on January 12th rather than on February 5th. The trial court denied Boostrom's motion, adjudged her action barred by the statute of limitations, and entered summary judgment for Bach on that ground. The Court of Appeals reversed, holding that an action commences for statute of limitations purposes when the complaint is tendered to the court in accordance with the filing requirements of Ind. Trial Rule 5(E). Boostrom v. Bach (1992), Ind.App., 589 N.E.2d 275, on reh'g, 603 N.E.2d 867. We disagree.

The applicable statute of limitations, Ind. Code Ann.§ 34-1-2-2 (West 1983), dictates that after a cause of action has accrued, an action must be commenced within the period therein prescribed and not afterwards. Under Ind. Small Claims Rule 2(A), a small claims action is commenced "by the filing of an unverified notice of claim in a court of competent jurisdiction." This language tracks that of T.R. 3, which provides: "A civil action is commenced by

filing a complaint with the court or such equivalent pleading or document as may be specified by statute." Accordingly, whether or not Boostrom's action is saved depends on whether her notice was "filed" within the prescribed period. We therefore must determine when a notice is filed under S.C.R. 2(A).

Boostrom argues that the answer to this question is found in T.R. 5 (E). The Indiana Trial Rules govern small claims proceedings to the extent that they are not inconsistent with the Small Claims rules. Meunich v. Gulden (1991), Ind. App., 579 N.E. 2d 665. Trial Rule 5 (E), entitled "Filing with the Court Defined," provides that the "filing of pleadings, motions, and other papers with the court as required by these rules" may be made by mailing to the clerk via registered or certified mail return receipt requested, and that filings so made "shall be complete upon mailing." Boostrom argues that this rule, read in conjunction with S.C.R. 2 (A), leads

to the conclusion that a small claims action is commenced when a notice of claim is mailed to the clerk.

This view misapprehends the significance of T.R. 5 (E), which only defines how a required filing may be made. Thus, while the Court of Appeals was correct in saying that the filing of a notice of claim may occur by certified mail return receipt requested and that the filing is complete upon mailing, it does not necessarily follow that an action is commenced by mailing only the notice.

Boostrom's attempt to bolster her position by drawing an analogy to our holding in Brady v. Eastern Ind. Prod. Credit Ass'n (1978) , Ind. App., 396 N.E. 2d 335, is not well taken. In Brady we held that the failure to tender the requisite fee did not deprive the Court of Appeals of jurisdiction to hear an appeal where the record was timely filed. This holding was grounded on the brief that appeals ought to be disposed of on the merits whenever possible, Brady, 396 N.E. 2d at 335, .

and that there are numerous methods by which to enforce effectively the payment of filing fees other than by couching such enforcement in jurisdictional terms. Id.; Brady v. Eastern Ind. Prod. Credit Ass'n (1977), Ind. Ap., 360 N.E. 2d 1267, 1269 (Sullivan, J., dissenting). Hinging commencement of an action under T.R. 3 to the payment of filing fees is one such method. Moreover, this Court's desire to dispose of appeals on the merits whenever possible does not displace the legislative policy which undergirds the statute of limitations. The Brady court rightly concluded that prepayment of the appellate filing fee was neither required by the statute then controlling[1] nor central to accomplishing the objectives of the rules which govern submission of appeals. Those rules exist to facilitate the orderly

[1] The controlling statute in the case at bar, Ind. Code Ann. § 33-19-5-5 (West Supp. 1992) provides that 'for each small claims action the clerk shall collect from the party filing the action a small claims costs fee of thirty dollars ($30).' We agree with the Court of Appeals that neither this provisions nor the raft of other statutes cited by the parties is dispositive of the issue before us.

presentation and disposition of appeals and prevent the confusing and awkward situation of having the trial and appellate courts simultaneously review the correctness of a judgment. Coulson v. Indiana & Michigan Elec. Co. (1984), Ind., 471 N.E.2d 278.The filing of a praecipe and subsequent presentation of the record fully safeguard these interests. On the other hand, the statute of limitations exists not only to spare courts from stale claims, Matter of M.D.H. (1982), Ind.App., 437 N.E.2d 199, but also "to insure that parties are given formal and seasonable notice that a claim is being asserted against them." State ex rel. Young v. Noble Circuit Court (1975), 263 Ind. 353, 359, 332 N.E. 2d 99, 103.

Tendering the prescribed court costs fee is relevant as to this latter objective. Cf. Ind. Code Ann.§ 33-19-3-5 (West Supp. 1992) (costs fee include cost of initiating service of process). Therefore, while we agree that "the filing of the complaint will toll the

statute of limitations," Civil Code Study Commission, Comments to Trial Rule 3, reprinted in 1 William F. Harvey, Indiana Practice 60 (2d ed. 1987), we also conclude that a notice of claim or complaint is not filed" unless the filing of the fee and the notice/complaint have occurred by any of the means permitted by T.R. 5(E).

Such an approach is consistent with the modern notion that the commencement of an action occurs when the plaintiff presents the clerk with the documents necessary for commencement of suit. See State ex rel. Long v. Marion Super Ct. (1981), 275 Ind. 533, 418 N.E.2d 218. Former practice dated commencement from the day the sheriff received the summons for service. Marshall v. Matson (1908), 171 Ind. 238, 86 N.E. 339; see also Jensen v. Fagan (1964), 138 Ind.App. 679, 685, 199 N.E. 2d 716, 719 (statute of limitations not tolled until clerk prepares and has "parted with the summons" by mailing it to sheriff). The former rule was

abandoned out of concern over the "significant amount of time" which could elapse between the completion of all the plaintiff's tasks which were necessary for the commencement of an action and the preparation of the summons by the clerk. See Civil Code Study Commission, supra. Payment of the filing fee, unlike issuance of summons by the clerk, is wholly in the hands of the plaintiff.[2]

The Court of Appeals observed that Boostrom's position is supported by the case law of other jurisdictions including some interpretations of Fed. R. Civ. P. 3.[3] Federal precedent upon this question was unsettled at the time we adopted T.R. 3, however, and continues to be so. See 2 James W. Moore et al., Moore's Federal Practice (para. 3.04, 3-16 & nn.5-6(2d ed.

"[2] The plaintiff, of course, controls the presentation of all the documents necessary to commencement of a suit: the complaint, the summons, and the fee. Boostrom used a standard pre-printed small claims form, which contains the complaint and the summons on a single page. She thus filed two of the three items necessary to commencement of her action.

[3] Rodgers on Behalf of Jones v. Bowen, 790 F.2d 1550 (11th Cir. 1986); see also Johnson v. Brown, 803 F. Supp. 1414 (N.D. Ind. 1992)

1993). Moreover, the principal Supreme Court opinion relied upon by those federal cases in accord with the Court of Appeals is Parissi v. Telechron, Inc., 349 U.S. 46 (1955) (per curiam). Like Brady, that opinion turned on perfecting an appeal and is, we think, equally distinguishable. Finally, we note that our holding today is consistent with that to other jurisdictions which have borrowed from Fed. R. Civ. P. 3. See, e.g., Mace v. Centel Business Sys., 549 So.2d 70 (Ala. 1989).

Conclusion

The filing of Boostrom's small claims fee did not occur until after limitation period had run. As such, her complaint was not filed within the prescribed period and is barred. The order entering summary judgment in favor of defendant Bach is affirmed.

DeBRULER, AND DICKSON, JJ., concur.
KRAHULIK, J., concurs in result.
GIVAN, J., dissents with separate opinion.

GIVAN, Justice. -- Dissenting

I respectfully dissent from the majority opinion in this case. I do not agree that the rules cited by the majority require the paying of a filing fee in order to constitute a filing within the statute of limitations. I believe the Court of Appeals opinion reported at Boostrom v. Bach (1992)-, Ind.App., 589 N.E.2d 275, on reh'g, 603 N.E.2d 867, is correct in stating: "[T]here is no statute stating that fees must be paid in advance before complaints will be deemed 'filed.'" Id. at 869.

I would deny transfer in this case.

APPENDIX C

Filed February 23, 1994

DENIAL OF PETITION FOR REHEARING

SUPREME COURT OF INDIANA

CAUSE NUMBER 82S04-9310-01177

BOOSTROM, REBECCA VS BACH, STEPHEN

Appellant's Petition for Rehearing of Petition to Transfer is Hereby Denied.

RANDALL T. SHEPARD, CHIEF JUSTICE.

DEBRULER, GIVAN, DICKSON, AND SULLIVAN, J.J., CONCUR.

APPENDIX D

Filed April 6, 1992

OPINION ON REMAND

No. 82A04-9008-CV-372

Court of Appeals of Indiana,
Fourth District.

Rebecca BOOSTROM, Appellant-Plaintiff,

v.

Stephen BACH, Appellee-Defendant.

CHEZEM, Judge.

Case Summary

Plaintiff-Appellant, Rebecca Boostrom, appeals from the summary judgment granted for Defendant-Appellant, Stephen Bach. We reverse and remand.

Issue

Boostrom presents three issues for our review; however, because we reverse, we only

need to address the following:

Did the trial court err when it refused to order that the Complaint, which was not accompanied by a filing fee, be file-marked the date of its certified mailing?

Facts and Procedural History

On January 12, 1990, Boostrom sent her Complaint against attorney Stephen Bach by certified mail to the Vanderburgh Small Claims Court. The Complaint alleged legal malpractice and breach of contract. Bach had previously represented Boostrom; however, he withdrew from representing her on January 19, 1988.

The Clerk did not file the Complaint on January 12, 1990 because Boostrom failed to enclose the $30 filing fee. Instead, the Clerk sent a letter to Boostrom on January 17, 1990, stating "[w]e must have a $60.00 Money Order for these (2) Small Claims cases." Thereafter, Boostrom sent the filing fees to the Clerk, and the Complaint was file-marked "February 5, 1990."

On April 24, 1990, Bach filed his Motion for Summary Judgment, alleging in part that Boostrom failed to file the Complaint within the two year statute of limitations. Boostrom then filed her Motion to Correct Minutes, alleging the Complaint should have been file-marked on the date of certified mailing, or January 12, 1990. She attached thereto copies of the certified mail receipt, proposed minute entry, and Clerk letter of January 17, 1990.

The trial court held a hearing on both motions on June 4, 1990.[1] At the conclusion of the hearing, the court held:

> Okay, I'll make a determination on that date. Show that the Motion to Correct Minutes is denied; that the filing--the record will reflect that Mrs. Boostrom has had numerous contacts with the Clerk's Office with reference to previous filings in this County and is well aware of the rules requiring a filing fee; that she has stated that no filing fee was filed whatsoever and the January 12th date does not go into effect

[1] Both parties mischaracterize the nature of this hearing. On March 13, 1990, the trial court clearly stated that all other motions "to be filed" were set for hearing on June 4, 1990.

because even though it was mailed by certified mail, it still was not perfected because there was no filing fee included. Therefore, the Court determines that the filing date was the date of the second mailing, which falls outside of the statute of limitations which tolled and ended on January 12th, 1990. Mr. Bach, you have a Motion for Summary Judgement based upon [the] failure to perfect filing in the suit within the necessary statute of limitations. We'll show the Motion for Summary Judgement is granted and that takes care of the case.

Discussion and Decision

Boostrom argues that "the lower court errored [sic] by law in denying the Motion to Correct Minutes of the file-mark date of the [C]omplaint, which was file-marked the date of late payment of the filing fee, instead of the date of certified mail filing of the Complaint." We agree.

[1] Of course, the law is well-established that a complaint is considered "filed" on the date it is sent by certified mail. As noted in Indiana Trial Rule 5(E)(2):

> (E) *Filing With the Court Defined.* The filing of pleadings and papers with the court as required by these rules shall be made by one of the following methods:
>
> * * * * * * * * * *
>
> (2) Mailing the papers to the clerk by

registered or certified mail return receipt requested;

* * * * * * *

Filing by registered or certified mail shall be complete upon mailing.

Further, a complaint is a "pleading" or "paper" subject to the filing provision of T.R.5(E)(2). *Chambers v. Estate of Market* (1979) , Ind. App. 397 N.E. 2d 636, 637. A complaint is "filed" for limitations purposes when it is properly mailed in accordance with T.R. 5 (E)(2). *Id.* We have also stated that 'any and all filings may be accomplished by mailing the matters to be filed to the clerk of the court by registered or certified mail, return receipt requested, and the filing is accomplished upon deposit in the mail." (*Seastrom, Inc. v. Amick Construction Co., Inc.* (1974), 159 Ind. App. 266, 306 N.E. 2d 125, 127.

[2] Here, the Complaint should have been filed-marked the date it was sent by certified mail--January 12, 1990. There is no statute, rule or case law stating that

filing fees must be paid in small claims courts before complaints will be filed. Indeed, the pertinent statute is silent in this respect:

> *Small claims costs fee.*
>
> (a) Except as provided under subsection (b), for each small claims action the clerk shall collect from the party filing the action a small claims costs fee of thirty dollars ($30). Ind. Code § 33-19-5-5.

Moreover, while there are no cases directly on point, we find to be instructive the case of *Brady v. Eastern Indiana Production Credit Association* (1978), Ind., 396 N.E. 2d 335. There, the record for the appeal was timely filed, but the filing fee was late. Consequently, the appeal was dismissed. On transfer, the dismissal was reversed by the Indiana Supreme Court, which stated as follows:

> It is hereby directed that the case of *Brady v. Eastern Indiana* Production Credit Assoc. (1977), Ind. App., 360 N.E. 2d 1267, be remanded to the Court of Appeals for consideration of the merits.
>
> This Court finds the reasoning of the dissent more in line with our stated policy to reach the merits of a case whenever possible. Additionally, this

> court relies on the case of *Peters et al. v. Poor Sisters of Saint Francis Seraph of the Perpetual Adoration Society*, Ind. (1971), 257 Ind. 360, 274 N.E. 2d 530, wherein this Court, under the former transfer filing fee statue, held the untimely receipt of the fee by the Clerk was not grounds for dismissal where the petition to transfer was timely filed. Thus, in applying the reasoning of *Peters, supra*, to this case we believe the untimely payment and receipt of the filing fee should not be grounds for automatic dismissal where the record is timely filed, as here.
>
> *Brady*, 396 N.E. 2d at 335 [citations omitted].

We also note our decision here is supported by case law in other jurisdictions. In *Rodgers on Behalf of Jones v. Bowen* (11th Cir. 1986), 790 F.2d 1550, 1552, the Eleventh Circuit Court of Appeals stated:

> We therefore hold that a complaint is 'filed' for statute oflimitations purposes when it is 'in the actual or constructive possession of the clerk,' regardless of the untimely payment of the required filing fee.
>
> * * * * * *
>
> Nevertheless, the severe sanction of dismissal should be imposed 'only in the face of a clear record of delay or contumacious conduct by the plaintiff.'
> [Citations omitted]

In *Matter of Estate of Crane* (1976), 15 Wash.App. 161, 548, P.2d 585, 586, the

Washington Court of Appeals stated:

> The sole issue [here] is whether timely payment of the superior court clerk's filing fee is a jurisdictional requirement for commencement of a will contest. We hold that it is not and reverse the trial court's order dismissing the petition to revoke the will of Edna Crane.

In *Hanks v. Floyd* (1977), 51 Ill.App.3d 1048, 10 Ill.Dec. 95,96, 367 N.E.2d 483, 484, the Illinois Court of Appeals stated:

> The sole issue to be decided is whether payment in advance of the filing fee is a condition precedent to the 'filing of a complaint,' for the effect of the trial court's order of dismissal was to hold that it is. Although by statute the fees of the clerk of the circuit court 'shall be paid in advance,' this language has been interpreted to be merely directory, not mandatory. In *Elles v. Industrial Comm.* (1940), 375 Ill. 107,30 N.E.2d 615, the plaintiff sought to appeal a decision of the Industrial Commission to the circuit court. However, the plaintiff sought to appeal a decision of the Industrial Commission to the circuit court. However, the plaintiff did not pay the filing fee. The clerk of the circuit court filed the action even though a statute provided that fees of the clerk 'shall be paid in advance.' The supreme court held that the statute was merely directory to the clerk and that the failure to pay the filing fee did not deprive the circuit court of jurisdiction.
>
> * * * * * *
>
> Accordingly, the order of dismissal of complaint is reversed, and the cause is remanded for further proceedings.

[3] In the present case, the court acquired jurisdiction when the Complaint was sent by certified mail to the Clerk on January 12, 1990. The Clerk then properly notified Boostrom that she had failed to enclose or pay the required filing fee. Boostrom then paid the fee on February 5, 1990. The Complaint should have been file-marked "January 12, 1990."

Reversed and remanded.

MILLER AND GARRARD, JJ., concurring.

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[2] We recognize the additional bookkeeping and administration burdens this decision may impose upon court clerks. Nevertheless, in cases where filing fees are not paid, we suggest the clerk notify the trial court so the case may be held in abeyance until the required sum is paid. We note the trial court may order that the filing fee be paid before proceeding in the matter. If a party fails to comply, the court may then impose the sanction of dismissal.

APPENDIX E

OPINION ON PETITIONS FOR REHEARING

Filed: November 23, 1992

Court of Appeals of Indiana

Fourth District

Cause No. 82A04-9008-CV-372

REBECCA BOOSTROM,

Appellant-Plaintiff,

vs.

STEPHEN BACH,

Appellee-Defendant

(Caption Omitted in Printing)

CHEZEM, J.

ON PETITIONS FOR REHEARING

Defendant-Appellee, Stephen Bach ("Bach"),

contends that we erred in our published opinion reversing the trial court's entry of summary judgment granted in his favor. See, Boostrom v. Bach (1992), Ind. App., 589 N.E.2d 275. In particular, he argues that statutory law requires prepayment of filing fee in small claims cases; that there was no competent or admissible evidence submitted in opposition to his summary judgment motion; and there was a complete failure of proof as to the damage element of the legal malpractice claim brought by Plaintiff-Appellant, Rebecca Boostrom ("Boostrom").

I

[1] Bach first argues that "[our] opinion incorrectly decided that there is no statute stating that filing fees in small claims courts are to be paid before complaints will be filed." He cites, on rehearing, different statutes than he relied upon in his initial appeal to this Court. Bach now cites Ind. Code §33-11.6-4-15 (which he concedes does not apply to the small claims court involved

in this case), which states in part that '[t]he docket fee and the cost for the initial service of process shall be paid upon the institution of each case.' He thus concludes that our opinion is 'in direct conflict with the intent of the legislature.' We disagree.

This newly cited statute requires fees to be paid upon the 'institution' of the case. In This respect,' institution' means at the start of or commencement of an action. See, Black's Law Dictionary (5th ed. 1979). Bach erroneously interprets the word 'institution' as meaning 'prepayment.' We note that 'prepayment' means to pay in advance, not at the start or commencement of an action. Id.

[2] Furthermore, this statute does not state that the fees must be paid before the complaint will be filed. Thus, we once again note that there is no statute stating that fees must be paid in advance before complaints will be deemed 'filed.' In addition, we are not persuaded by the other

statutes cited by Bach.

II

Bach next argues "[t]here was no competent, admissible evidence submitted by Rebecca Boostrom in opposition to the Motion for Summary Judgement." In particular, he argues:

> On May 11, 1990, Boostrom filed a Motion to Correct Minutes requesting that her Complaint be file-stamped on January 12,1990, instead of February 5, 1990. This Motion to Correct Minutes was not a verified motion. It was not sworn to in any way. The exhibits attached to the Motion to Correct minutes were also not authenticated or sworn to in any way, and Boostrom was not under oath on June 4, 1990, when the court heard both motions. This Court could therefore not consider this inadmissible evidence.

The parties in this case were in small claims court. Thus,the proceedings were informal, and the parties were not bound to follow the rules of evidence. As stated in Indiana Small Claims Rule 8(A):

> The trial shall be informal, with the sole objective of dispensing speedy justice between the parties according to the rules

> of substantive law, and shall not be bound by the statutory provisions or rules of practice, procedure, pleadings or evidence except provisions relating to privileged communications and offers of compromise.

[3] Bach makes the argument that, while the rules of evidence may not be binding at a trial in small claims court, the rules are binding at a summary judgment hearing in small claims court. We disagree. We have indicated previously that Rule 8(A) may apply to summary judgment proceedings in small claims courts. Bedree v. Sandler & Sandler (1981), Ind. App., 426 N.E.2d 707. In Bedree, while discussing whether summary judgments were appropriate in small claims actions, this Court stated that "Small Claims Rule 8 concerns itself with the informality of the actual hearing of trial." Id.

Furthermore, the rules clearly state that parties should be able to represent themselves in small claims courts. As noted in I.C. § 33-11.6-4-6, " A simplified procedure shall be established by rule to enable any person to

file the necessary papers and present his case in court either to seek or to defend against a small claim without consulting or being represented by an attorney." This very purpose would be defeated by requiring a formal summary judgment hearing at which the parties were bound by, and required to follow, the rules of evidence. Indeed, applying the rules of evidence at summary judgment but not at trial would create an opportunity for those represented by counsel to take advantage of those who are not.

[4] Accordingly, we disagree with Bach's contention that there is no competent or admissible evidence in the record opposing his summary judgement motion. Boostrom's exhibits included copies of receipts for certified mail indicating the Complaint was sent to the small claims court and Bach on January 12, 1990; a copy of a proposed minute entry stating that Boostrom filed her Complaint on January 12, 1990; a copy of a letter, dated January 17, 1990, from the clerk

(Betty K. Smith) and deputy (Virginia L. Seybold) to Boostrom indicating that they needed $60 in filing fees from Boostrom; a copy of the envelope which had contained the clerk's letter to Boostrom, dated January 17, 1990. This admissible evidence supported the decision we originally rendered in this case.

III

Bach next argues that we should have nevertheless affirmed the summary judgment on his alternative theory that there was a complete failure of proof as to the damage element of the legal malpractice claim. In particular, he argues:

> Bach presented uncontroverted evidence that the withdrawal of his representation of Boostrom was accomplished without adverse effect to her. He therefore negated an essential element of the cause of action for attorney malpractice -- damage.

Bach withdrew his representation of Boostrom citing Rule of Professional Conduct 1.16(b), which states in part that "a lawyer may

withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client." The trial court allowed the withdrawal, finding no adverse effect on Boostrom.

[5,6] The mere fact that an attorney can withdraw his representation without adverse effect on his client does not also establish that there has been no legal malpractice. For instance, a lawyer can withdraw during the discovery phase of a breach of contract case (without adverse effect on his client), and yet have committed malpractice by failing to timely plead or file (with the statute of limitations) his client's additional claim for negligence against the defendant.

Moreover, the small claims court never addressed the damage issue at the summary judgment hearing because it determined that the case was barred by the statute of limitations. Boostrom was unable to present any argument or evidence on the damage issue

because the court granted Bach's summary judgment motion after hearing arguments only as to the statute of limitations issue. The court never reached the damage issue.

Petition denied.

IV

We next address Boostrom's Petition for Rehearing and Motion to Correct Error on the Motion for Consolidation ("Boostrom's Petition"), and Bach's Motion to Strike [Boostrom's Petition].

Boostrom argues that we abused our discretion in denying her request for consolidation on March 30, 1992, and the trial court likewise abused it discretion in denying her request for consolidation filed in the case of Boostrom v. Sheets. Boostrom states that "[we] might want to give an opinion in [sic] rehearing that the decision for consolidation should be made in the lower court" and that we should "order the lower

court to hold an evidentiary hearing" on consolidation.

We note the arguments and authorities cited by the parties and hereby deny Boostrom's Petition.

MILLER, J., and GARRARD, JJ., CONCURRING.

APPENDIX F

SMALL CLAIMS COURTROOM VERBATIM RULING

"BY THE COURT: Okay, I'll made a determination on that date. Show that the Motion to Correct Minutes is denied; that the filing--the record will reflect that Mrs. Boostrom has had numerous contacts with the Clerk's Office with reference to previous filings in this County and is well aware of the rules requiring a filing fee; that she has stated that no filing fee was filed whatsoever and the January 12th date does not go into effect because even though it was mailed by certified mail, it still was not perfected because there was no filing fee included. Therefore, the Court determines that the filing date was the date of the second mailing, which falls outside the statute of limitations which tolled and ended on January 12th, 1990. Mr. Bach, you have a

Motion for Summary Judgement based upon failure to perfect filing in the suit within the necessary statute of limitations. We'll show the Motion for Summary Judgement is granted and that takes care of the case."

(Verbatim courtroom ruling,June 4, 1990, Record, Transcript, p.116-117)

APPENDIX G

SUMMARY JUDGEMENT

Filed: June 4, 1990

STATE OF INDIANA

COUNTY OF VANDERBURGH

VANDERBURGH SUPERIOR COURT

SMALL CLAIMS DIVISION

Cause No. 82D06-9002-SC-819

Rebecca Boostrom,
Plaintiff

VS.

Steve C. Bach,
Defendant

SUMMARY JUDGMENT

Comes now the plaintiff, Rebecca Boostrum, in person Pro Se, and the defendant, Steve C. Bach, in person Pro Se, for hearing on the Defendant's Motion for Summary Judgment, and the Court being duly advised in the premises,

and having heard the evidence in support of said motion, now finds that there is no genuine issue of material fact regarding this cause of action, and that the law is with the defendant and against the plaintiff on all issues presented by the plaintiff's complaint and amended complaint, and that the defendant is entitled to summary judgment as a matter of law.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED that:

1. This action was filed on February 5, 1990, and was filed more than two years after all alleged acts of malpractice occurredupon which the plaintiff bases her action herein: that the plaintiff has no valid excuse for not filing her action before said date.

2. That all of the acts alleged in plaintiff's complaint or amended complaint are for malpractice and come within the provisions of Indiana Code Section 34-1-2-2 (1).

3. That the plaintiff has no claim for breach of contract in her complaint or amended complaint other than for said alleged acts of malpractice and no damages are alleged for breach of contract that are not barred by said statute of limitations.

4. That as a result of this action being barred by said statute of limitations the plaintiff shall take nothing by her complaint or amended complaint.

/s/ Illegible

_____

Judge, Vanderburgh Superior Court, Small Claims Division

I HEREBY CERTIFY THAT A TRUE COPY OF THE ABOVE AND FOREGOINGHAS BEEN FORWARDED TO, Rebecca Boostrum, Plaintiff, at 750 Walker #118, Bloomington, IN 47403, THIS 7th day of June, 1990.

/s/ Steve C. Bach

_____

Steve C. Bach, Defendant & Attorney
P.O. Box 592
Mt. Vernon, IN 47620
(812) 838-0043

PUBLISHER'S NOTE:

Page(s) 39 missing in original.

RELEVANT PORTIONS OF TRANSCRIPT

(Side captions omitted for printing)

June 4th, 1990

[R73] BY THE COURT: Okay, I'll have to read through these.

MR. BACH: Judge, there is a petition for transfer to Superior Court. I thought this was Superior Court, but--

MRS. BOOSTROM: Well, I would like to say something first, if you don't mind. I'm the plaintiff.

BY THE COURT: Just a moment.

MR. BACH: I'm addressed the Court. I assume that I have a right to speak.

MRS. BOOSTROM: Well, this has to do with the possible disqualification of the Judge.

* * * * *

(Omitted for printing is discussion [R73-75] on possible disqualification of Judge Donald Vowels, Pro Tempore)

[75] BY THE COURT ... but I have no specific recollection of any particulars of

that case, so I'm not going to recuse myself. Alright, the--

MR. BACH: Judge, can I make one remark?

BY THE COURT: Yes, sir.

MR. BACH: Mrs. Boostrom today filed a Petition to Transfer. I assume she is wanting it to be out of Small Claims Court.

BY THE COURT. Uh-huh.

MR. BACH: And I would appreciate it is the Court could hear that first because I don't think the Court will sustain it under the authority I've got, but if the Court did, then there would be no need for the Court to hear the remainder of the matter here today.,

BY THE COURT: Okay.

MRS. BOOSTROM: I would like to say something since I'm the plaintiff. I would like the Court to hear today the Motion to Correct Minutes because that affects the statute
of limitations and I would also like to hear-- a Court to hear a partial summary judgment of his regarding the statute of limitations--

BY THE COURT: The motion--

MRS. BOOSTROM: --before the transfer because he made me come all the way down here from Bloomington although he knew I didn't have any money for gas and had to borrow it.

(Omitted for printing is discussion [R76-85] initiated by Bach about Mrs. Boostrom's personal involvement in two other prior actions in which Mrs. Boostrom was heir or party.)

[R86] MRS. BOOSTROM: Your Honor, I did borrow money to come down here. Could we at least correct the Court minutes first so at least we can get something on the record for all my time and expense in coming, if you don't mind.

BY THE COURT: What's the need for the correction? Okay, the Motion to Correct Minutes--

MR. BACH: Judge, I think the transfer comes first because certainly, I'm sure that we will be able to meet that, but I thought the Court maybe to expedite matters would rather hear the transfer petition first.

BY THE COURT: Okay, let me just see about that.

MR. BACH: Now, if she want to--

MRS. BOOSTROM: Well, Mr. Bach, I'm the plaintiff.

MR. BACH: If she wants to submit that, I'll be happy to submit that, Judge--

MRS. BOOSTROM: I'm the one--I'm the one who you made drive all the way down here.

MR. BACH: -- because I don't think she ever got into **[R87]** Court.

BY THE COURT: Okay, Mrs. Boostrom--

MR. BACH: And if she wants to submit it on the merits, I'm in favor it.

BY THE COURT: Okay, what is your Motion to Correct Minutes? Explain that to me.

MRS. BOOSTROM: Well, this is important because it deals with the statute of limitations.

BY THE COURT: Okay, specifically, what is it that we're talking about.

MRS. BOOSTROM: Can you find your copy of it there?

BY THE COURT: There's a lot of things here. It's a matter of finding it. Why don't you briefly summarize what it is.

MRS. BOOSTROM: Well, it's just to correct the file date and I brought another copy of it. But I don't have a copy of my motion.

BY THE COURT: Okay, I have a copy of it. I found it.

MRS. BOOSTROM: Oh, you found it? Okay.

BY THE COURT: I found it.

MRS. BOOSTROM: It was filed by certified mail, but the **[R88]** clerk didn't show the date of completion by mailing by certified mail. She showed a date after the payment because they asked me to send a money order.

THE COURT: Rather than a check?

MRS. BOOSTROM: Uh-huh.

MR. BACH: Your Honor, if she's going to claim payment at the time she submitted that complaint, I have two witnesses to call from the Clerk's Office that would state that she did not file any--any that's the very basis of the motion claiming the statute of limitations

has run because she did not pay any filing fee at the time that the case was filed and I have two witnesses up in the Clerk's Office.

MRS. BOOSTROM: Well, I thought that I had sent a check, but it doesn't matter. This is the exhibit I would like to file. You can perfect your claim after you file it.

MR. BACH: No, you cannot. That's the very problem.

[R89] MRS. BOOSTROM: This is Indiana Forms of Pleading and Practice Trial Rule 1, NO. 3.08. It states: As noted above, an action shall be deemed commended when the complaint is filed with the Clerk, even though summons has not being used or the filing fees paid. What then if a plaintiff refuses or fails to cause summons to be issued or to pay the filing fee within a reasonable time after filing the complaint? I did pay the filing--

MR. BACH: Is that Indiana authority?

MRS. BOOSTROM: Yes, I just--

MR. BACH: That's the old one then.

MRS. BOOSTROM: Also, here is another exhibit, 1989 supplement--

MR. BACH: Well, this is not Indiana authority. This is--

BY THE COURT: Some pleading and practice--

MRS. BOOSTROM: That is from Indiana forms. This other case is 1989 supplement, Volume 1, Indiana

[R90-91] PLAINTIFF'S EXHIBIT NO. 2, OFFERED INTO EVIDENCE:

[R92] MRS. BOOSTROM: Forms of Pleading and Practice. This is Indiana Appellate Court, 1979, in Chalmers vs. Estate of Market, 397 N.E. 2nd 636. The complaint was mailed by registered mail before the statute of limitation had run, but was not actually received and filed marked by the Court Clerk until after the statute had run. The Trial Court held the filing was complete upon mailing, relying upon Trial Rule 5(e) and refused to hold the action barred by the statute of limitations. So by all of these cases, the filing was complete upon mailing by certified mail and not--it was perfected when

the money order was sent, but the date of the file mark should be the date of certified mailing according to the law.

MR. BACH: Your Honor, this is under Federal Trial Rule 41 which has culpatory provisions here and **[R93]** this is not the law where the Legislature had made it mandatory that the filing fee be paid at the time that the complaint is filed and I have direct authority on that and a very good case which I have already submitted. Here's the statutory provisions too and here's the case and it says and it gives a very good reason why that filing fee must be paid in advance.

MRS. BOOSTROM: That is not required by the Indiana Appellate Court because in my case with Mr. Sheets, the filing fee was not paid until after I filed it and they still backdated the file mark date.

MR. BACH: I don't know what the circumstances were with Mr. Sheets, but that's not authority for this case.

MRS. BOOSTROM: Well, I know that is the practice of the Appellate Court in Indiana because that's what they did.

MR. BACH: This is a matter of limitations, Your Honor, **[R94]** it is not a matter of whether or not she's got a right to be in Court if she's within the statute of limitations. But I would like to argue that, if I could, please. Now, in fact, the Legislature has provided in those statutes that I have cited to the Court there, given the Court copies of them, that the plaintiff at the time that she files her complaint shall pay the court costs. Now, that's not the Indiana Supreme Court or the Rules of Procedure, that is what the Legislature has sent down as a requirement and that was tested in the Connecticut case which I cited to the Court. In that case, there were people that could legitimately claim that there were paupers, but the Court did not permit it and that's the only case I've found. This case here was just submitted to me today, but I think there will be some distinctions. I

don't think that comes under the recent statute passed by the Legislature. **[R95]** But the Court in that Connecticut case says there's two principal reasons for requiring that; that the Legislature has a legitimate reason for requiring that the--that the Legislature has a legitimate reason. One is that a party cannot just go out like a shotgun and shoot everybody on the block. That's one of the reasons. And the other is because it is a proper function to use costs to pay the expenses of the Court and the Court has--I mean the Legislature has a legitimate reason for requiring tat fee in advance.

MRS. BOOSTROM: I would like to answer Mr. Bach's argument. I am an English teacher certified by the State of Indiana to teach English. The word shall doesn't mean that you have to do it in advance, but it just means in this case that you must do it.

MR. BACH: It says, I believe, that--

MRS. BOOSTROM: Excuse me, Mr. Bach, I'm speaking.

[R96] MR. BACH: Well, I thought you were through.

MRS. BOOSTROM: No, I haven't sat down. And shall in some legal terminology also does not mean in the future, which could mean, if you want to say shall means in the future, it could mean after you file it then you shall pay the filing fee, if you want to use shall in the future tense, but shall here just means must and the--I have already submitted Trial Rule 1 from Indiana Forms and Practices where when it says you shall, it can be done within a reasonable amount of time to perfect your complaint. And that's the meaning of shall. And also, a complaint is considered complete when mailed by registered mail and it doesn't say here that the filing fee has to be sent at that time. But the filing fee does have to be paid, otherwise it can be thrown out for lack of prosecution by Trial Rule 41, which is not because it had to be paid at the time, **[R97]** but because you can't proceed with the case if it's never paid.

BY THE COURT: What's the time frame on the statute of limitations that we're talking about?

MR. BACH: Two year statute, Your Honor.

BY THE COURT: I mean from when would it have tolled?

MR. BACH: It would have tolled I believe the 19th of January that the Court permitted me to withdraw.

BY THE COURT: Of 1988, okay.

MR. BACH: And under my affidavit I state there were no services performed after that time and the Court--actually the Court is aware of the fact even if the statute of limitations had not run then, which it had, everything would have run before that time because of the fact that she did not file until January the 5th. It may be better for me to bring the two deputies down here to show that she did not pay the court costs at the time. They did not file it at that time. They were under **[R98]** instructions from the State of Indiana not to accept for filing anything where the filing fee was not paid in

advance and they sent that back to her. It was never filed. The Court in its own--the only evidence before the Court here is the filing date on the complaint is February the 5th.

MRS. BOOSTROM: I would like to make an answer.

MR. BACH: She cannot--well, let me. One other thing I want to add.

MRS. BOOSTROM: Well, you have sat down.

MR. BACH: She cannot correct something, as she never arrived in the first place and she didn't.

BY THE COURT: Okay, ma'am?

MRS. BOOSTROM: It is not a matter of correcting this as it was a matter of perfecting my complaint and I have noticed before that the Clerks in this Court have never been instructed to file something according to the certified mail date. I have sent other petitions where a statute of limitation was **[R99]** not involved and the Clerks don't file it according to the certified mail date, so this is not used in

this Court as it is supposed to be by law. In Mr. Sheets' case, we had to correct three or four dates because the Clerks weren't dating the file mark according to the date that it was complete upon mailing by certified mail, so this is not correcting my fault, but it's correcting the practice in this Court where the Clerks have not been instructed. And I brought this to the attention of the Clerk of the Court one time because I am not a lawyer, but it has happened to me too many times, but she was a new clerk, so apparently she didn't pay too much attention to it because she had so many other things to learn. But this Court is not following that practice of using the date of the certified mail postmark and so I'm sure you're **[R100]** going to come across this again, but the Judge corrected a lot of dates for the file marked date and I do know in Mrs. Sheets' case, when it went to the Appeals Court, that I did not have the filing fee and they accepted my brief, but they did not file it until after the filing fee was paid through the motion to proceed in forma pauperis was

granted, then they changed the file marked date to the date that it was received, so this is the practice of the Indiana Appellate Court and I already gave a--not of federal cases, but Indiana cases on this.

MR. BACH: Your Honor, I wonder if we could get this 397 N.E. 2d. Mrs. Boostrom has also cited another authority which I'm going to show was reversed by the Supreme Court after the Appellate Court made the decision she cited. So I would like to see that because I just do not believe it. The Court will also notice there, I gave the **[R101]** Court a copy of that, 33-19-3-2. It says a person entitled to bring a civil action or petition for the appointment of a guardian under IC 29-3-5 may do so without paying the required fees or other court costs upon filing in court, under oath and in writing, a statement. In other words, to file, the wording of that statute indicates that she's not entitled unless she pays the court costs or she files an affidavit forma pauperis.

MRS. BOOSTROM: Your Honor, that is exactly what happened in the Appellate case with Mr. Sheets, but they dated the date prior to the time that I filed the Motion to Proceed in Forma Pauperis.

BY THE COURT: Okay. Let's take a short break. I want to look at this case and the Trial Rules.

MR. BACH: Yes, I would like to see that.

MRS. BOOSTROM: I would like to see what you're talking about, Mr. Bach.

[R102] MR. BACH: Well, you cited the case.

MRS. BOOSTROM: I mean where you said what I showed from Trial Rule 1 was reversed. I would like to see that. I haven't seen that. You said what I quoted was reversed.

MR. BACH: I didn't say anything was reversed

RECESS OF THE COURT.

[Caption omitted in printing]

MR. BACH: You've look over those two cases, haven't you judge?

BY THE COURT: Uh-huh.

MR. BACH: Yes.

BY THE COURT: I've read through the Chalmers case. Mr. Bach, the case that you were referring to, the second case, which case were you referring to? I've read the Connecticut case **[R103]** too.

MRS. BOOSTROM: Your Honor, I've found two more references.

BY THE COURT: Okay, you looked--what book do you have there, it is 1990?

MRS. BOOSTROM: Burns Indiana Statutes.

BY THE COURT: Did you run off those cases?

MRS. BOOSTROM: Yes, I did, except one. I didn't have--

MR. BACH: Your Honor, I wonder if copies could be made of that because--

MRS. BOOSTROM: --enough money.

MR. BACH: --I don't know what she's submitting.

MRS. BOOSTROM: Okay, this is from Indiana Forms of Pleading and Practice, Trial

Rule 1, when it is a complaint filed with the Court.

BY THE COURT: Okay, this is what you just brought me.

These Indiana Forms and Pleadings are not mandatory authority. The Thompson case would have been interesting.

MRS. BOOSTROM: And this is based on Trial Rule 3 for commencement of an action. I didn't have **[R104]** enough money to copy this page.

BY THE COURT: What happened to the rest of the balance of the twenty-seven thousand dollars that you got?

MRS. BOOSTROM: I'm supposed to get fourteen thousand later and I'll get about five hundred a year and I got some of it previously, as stated in my Motion to Proceed Pauperis [added for clarity: in the Sheets vs. Boostrom case previously alluded to] and some of it was in the form of household things.

MR. BACH: Your Honor, here is another authority too. That shows the general authority also that the fee is required in

advance. It must be paid, it's jurisdictional. And that's the federal authority. Now, where advanced costs are to be paid, that's entirely different than when a fee is required to be paid. Advanced costs just goes to the protection of the other party, but the fee goes to the operation of **[R105]** the Court and to prevent frivolous lawsuits.

BY THE COURT: Okay, Mrs. Boostrom, could I see--

MRS. BOOSTROM: Here's Trial Rule 3 for commencement of an action.

BY THE COURT: Okay, I have the same book here; I have the Annotated.

MRS. BOOSTROM: Okay.

BY THE COURT: Mrs. Boostrom, you have a--you're an English teacher?

MRS.BOOSTROM: Yes, sir.

BY THE COURT: You aren't employed though?

MRS. BOOSTROM: I am a graduate student at Indiana University, so I have--

BY THE COURT: How is it that you pay your tuition?

MRS. BOOSTROM: I have paid some of my own tuition and my aunt, before she got sick, paid some of my tuition.

BY THE COURT: What sort of degree are you going for now?

MRS. BOOSTROM: A doctorate.

BY THE COURT: You already have a Master's Degree and **[R106]** are going for your PhD?

MRS. BOOSTROM: Yes.

BY THE COURT: And when will that be completed?

MRS. BOOSTROM: I don't know. They give you up to twelve years.

BY THE COURT: How long have you been going for the PhD?

MRS. BOOSTROM: Well, I have been delayed a lot. I have been there three years, but I was delayed a lot by the case in which Mr. Bach was supposed to represent me.

BY THE COURT: And you're not working while you're in school.

MRS. BOOSTROM: Yes, I have been. I was unemployed a couple of weeks ago, but now I have a temporary job.

BY THE COURT. Doing what?

MRS. BOOSTROM: Date entry.

BY THE COURT: And how much do you make an hour there?

MRS. BOOSTROM: I work six hours a day, five days a week, thirty hours a week, and it's a **[R107]** job that depends on fifty percent production. Right now I'm only doing between twenty and thirty-five percent production.

BY THE COURT: How much are you making now?

MRS. BOOSTROM: So the job might not last if I can't type numbers faster. I'm currently making $5.95, but I haven't been paid yet on this job.

BY THE COURT: So you don't have any physical or mental disability that would preclude you from holding employment.

MRS. BOOSTROM: No. I work parttime all during the school year.

BY THE COURT: Okay.

MR. BACH. Judge, I guess that she's submitting this generally that I should argue the other points also here.

BY THE COURT: The other points in reference--

MR. BACH: In the Motion for Summary Judgment. We had an order from Judge Brune that permitted me to withdraw in this case and I have authority **[R108]** there that says that as long as that order stands, that it is valid unless it is--an appeal is taken from it.

MRS. BOOSTROM: Your Honor, could we do one thing at a time--

MR. BACH: No, we can't.

MRS. BOOSTROM: --in case this has to go to the Appellate Court.

BY THE COURT: Mr. Bach, the way I see--

MRS. BOOSTROM: Because Mr. Bach has a tendency to jump all around.

BY THE COURT: Okay. The Motion to Correct Minutes would seem to be the prelude to your Motion for Summary Judgment. If, in fact, I denied it, then it would be outside

the statute of limitations which would take care of your Motion for Summary Judgment. I just--I'm trying to determine at this time the filing fee. Mrs. Boostrom, how many cases have you filed in Vanderburgh County, do you know, personally, as a--

[R109] MRS. BOOSTROM: Well, I used to file some Small Claims, you know, for eviction and to collect rent and damages.

BY THE COURT: Alright, you've filed an estimate of how many cases on your own, without an attorney?

MRS. BOOSTROM: I don't know, just for rent and damages, I don't know. I can't remember, at least six.

BY THE COURT: Okay, and then in some other cases that you've had up there in the past few years, other than the rent and damage cases?

MRS. BOOSTROM: I haven't filed any cases recently.

BY THE COURT: Since January of 1989, have you filed any cases, other than this one?

MRS. BOOSTROM: I haven't had to file any rent and damage cases for a long time down here.

BY THE COURT: Any other type of case? Any other type of case at all?

MRS. BOOSTROM: Well, I countersued Mr. Sheets. That was in 1988.

MR. BACH: You have a case against Mr. Hatfield too, don't **[R110]** you?

MRS. BOOSTROM: Yes, I filed that at the time that I filed against you since you two never got my case settled.

BY THE COURT: Alright, the situation in Mr. Hatfield's case, is it the same?

MRS. BOOSTROM: I filed it at the same date I filed against him.

BY THE COURT: Is there a same or similar petition for Motion to Correct Minutes in that?

MRS. BOOSTROM: Well, there the statute of limitations is based on either two years or six year, but the exact date is not important.

BY THE COURT: Okay, and how did you pay that. You sent the filing fee in with personal check then.

MRS. BOOSTROM: I paid it at the same time that I paid this.

BY THE COURT: In what manner?

MRS. BOOSTROM: This receipt shows money order.

BY THE COURT: Oh, and you sent it in on the same date?

MRS. BOOSTROM: I thought I had sent a check and they **[R111]** wrote back and said I needed to send a money order, so I sent a money order.

BY THE COURT: Well, let me just ask you a question, you filed the suit against Mr. Hatfield and you mailed it on January 12th, just this same date that you did this?

MRS. BOOSTROM: Yes, the same date.

BY THE COURT: And in Mr. Hatfield's case, how is it that you paid the filing fee, did you write a check on January 12th?

MRS. BOOSTROM: I submitted a money order for thirty dollars.

BY THE COURT: On January 12th?

MRS. BOOSTROM: No, this receipt here was for both cases. They wrote back and said I needed to send a money order.

BY THE COURT: You sent a check on them both?

MRS. BOOSTROM: I thought I had. Mr. Bach says I didn't I can't prove that I did. I just thought I did, but I think-

BY THE COURT: Well, I need you to answer my question on **[R112]** Mr. Hatfield's case.

MRS. BOOSTROM: I paid it the same date ~~that I~~ paid Mr. Bach's.

BY THE COURT: Did you write a money order on that one?

MRS. BOOSTROM: Yes, the same money order.

BY THE COURT: On January 12th?

MRS. BOOSTROM: Yes.

BY THE COURT: January 12th?

MRS. BOOSTROM: No, I filed the cases the same date, but she--

BY THE COURT: This one was filed on January 12th. Was Mr. Hatfield's also filed on January 12th?

MRS. BOOSTROM: See here's--I thought I submitted this with my Motion to Correct Error. This is what she wrote back. We must have a sixty dollar money order for these two Small Claim cases.

BY THE COURT: So you sent a check in for both in the first place, right?

MRS. BOOSTROM: Well, I thought I had.

MR. BACH: Your Honor, that is absolutely wrong and the **[R113]** record speaks for itself. There is nothing to contradict that record in here.

BY THE COURT: Do you have a copy of that check?

MRS. BOOSTROM: No.

BY THE COURT: They didn't send you that check back?

MRS. BOOSTROM: I thought I had sent a check and then she wrote and said she needed a money order.

BY THE COURT: Oh, you hadn't sent in anything, is that right?

MRS. BOOSTROM: I didn't pay any attention to it, I just sent the money order 'cause a lot of people require you to send a money order, not a check.

BY THE COURT: In paragraph four of your Motion to Correct Minutes, it says the deputy clerk wrote to me and requested a money order, not a check, for the filing fee.

MRS. BOOSTROM: Uh-huh.

BY THE COURT: Did you send a check in originally?

MRS. BOOSTROM: Well, then later I looked 'cause I wanted--

[R114] BY THE COURT: Yes or no, did you send a check?

MRS. BOOSTROM: --to see if I had and I looked in my checkbook register and I couldn't find any record that I had sent a check, so I don't think I did 'cause I couldn't find a record that I did. But at the time, I thought that I had.

BY THE COURT: So no money was sent in at all on January 12th?

MRS. BOOSTROM: Well--

BY THE COURT: No filing fee at all?

MRS. BOOSTROM: --I thought that I did, but then when I looked back later in case that it came up if I had any proof that I did, I couldn't find anything in my checkbook register, so I don't have any proof that I did.

BY THE COURT: Your Motion for Summary Judgment, does that lie with the statute, the lapsed statute of limitations had run, correct, that's the--

[R115] MR. BACH: That's part of it, Judge. There's two other bases too. One is that--

MRS. BOOSTROM: Your Honor, I wish we would just argue one thing at a time in case I have to--

BY THE COURT: Mrs. Boostrom, I'll decide how we're going to proceed here.

MRS. BOOSTROM: --go to the Appellate Court--

BY THE COURT: Go ahead, Mr. Bach.

MRS. BOOSTROM: --because he jumps around.

BY THE COURT: Mrs. Boostrom, I'll decide how we'll proceed here. Mr. Bach will finish.

MR. BACH: The Court will notice from the certified copy of the motion, the Court after motion was filed--

MRS. BOOSTROM: Your Honor, he asked that the transfer to the--

MR. BACH: Would you please now let me argue. Are you objected to me--

MRS. BOOSTROM: I am a poor person. I have to have justice.

MR. BACH: --interrupting you.

MRS. BOOSTROM: I cannot pay--

[R116] BY THE COURT: Alright, Mrs. Boostrom, I need to hear what he has to say. I've asked him a--

MRS. BOOSTROM: But I don't want the Motion for Summary--

BY THE COURT:--and he's trying to answer me.

MRS. BOOSTROM: --Judgment to be heard until we determine this date.

BY THE COURT: Okay, I'll make a determination on that date. Show that the Motion to Correct Minutes is denied; that the filing--the record will reflect that Mrs. Boostrom has had numerous contacts with the Clerk's Office with reference to previous filings in this County and is well aware of the rules requiring a filing fee; that she has stated that no filing fee was filed whatsoever and the January 12th date does not go into effect because even though it was mailed by certified mail, it still was not perfected because there was no filing fee included. Therefore, the Court determines that the filing date was **[R117]** the date of the second mailing, which falls outside of the statute of limitations which tolled and ended on January 12th, 1990. Mr. Bach, you have a Motion for Summary Judgment based upon failure to perfect filing in the suit within the necessary statute of limitations. We'll show the Motion

for Summary Judgment is granted and that takes care of the case.

MR. BACH: Thank you, Judge. Do you want me to prepare an entry for that?

BY THE COURT: If you would, sir.

MR. BACH: Yes.

AND THIS CONCLUDED ALL PROCEEDINGS HAD IN THIS COURT AT THIS TIME.

COURT ADJOURNED.

(Certifications omitted in printing)

Appendix I
Rules, Statutes & Codes

"The statutes making the payment of fees a prerequisite to filing a complaint are directory only, and a failure to pay these fees will not render the filing of a complaint invalid."

"A clerk of court may justifiably refuse to file a complaint until the proper fees have been paid. "

(*Orr v. Culpepper*, 161 Georgia. App. 801, 288 S.E. 2d 898 (1982).

Vanderburgh Superior Court Rule 5 states: "All withdrawals of appearance shall be in writing and by leave of Court. Permission to withdraw shall be given only after the withdrawing attorney has given his client ten (10) days written notice of this intention to withdraw by both regular and certified mail and has filed a copy of such with the Court; or upon a simultaneous entering of appearance by new counsel for said client. The letter of withdrawal shall explain to the client that failure to secure new counsel or to indicate to the Clerk that the client intends to represent himself, may result in dismissal or the client's case or a default judgment may be entered against him, whichever is appropriate, and other pertinent information such as trial date or any other hearing date. In no event will the Court grant a request for withdrawal of appearance unless the same has been filed with the Court at least ten (10) days prior to trial date, except for good cause shown." "*Rules Of The Vanderburgh Superior Court*," Rule 5.

Small Claims Rule 2

COMMENCEMENT OF ACTION

(A) In General. An action under these rules shall be commenced by the filing of an unverified notice of claim in a court of competent jurisdiction.

(B) Form of Notice of Claim. The notice of claim shall contain:

(1) The name of the court;

(2) The name, address and telephone number of the claimant and defendant(s);

(3) The place, date and time when the parties are to appear for trial of the claim, which date shall not be less than ten [10] days nor more than forty [40] days after service of said notice of claim;

(4) A brief statement of the nature and amount of the claim and

(a) If the claim arises out of written contract, a copy shall be attached; however, the fact that a copy of such contract is not in the custody of the plaintiff shall not bar the filing of the claim;

(b) If the claim is on account, an itemized statement shall be attached;

(5) A statement that the parties may appear either in person or by an attorney;

(6) An instruction to the defendant that the defendant should bring to the trial all documents in the possession of or under the control of the defendant concerning the claim;

(7) A statement that if the defendant does not wish to dispute the claim he may nonetheless appear for the purpose of allowing the court to establish the method by which the judgement shall be paid;

(8) The name, address and telephone number of the person designated by the court with whom the defendant may communicate if defendant is unable to appear at the time or place designated in the notice;

(9) A statement that a default judgment may be entered against the defendant if he fails to appear for trial; and

(10) Notice of the defendant's right to a jury trial and that such right is waived unless a jury trial is requested within ten [10] days after receipt of the notice of claim; and

(11) Any additional information which may facilitate proper service.

(C) Assistance by Clerk. The clerk of the court shall prepare and furnish blank notice of claim forms and the clerk of the court, or other employee of the court as the judge may designate, shall, upon request, assist individual claimants in the preparation thereof, but all attachments to the notice of claim shall be furnished by the claimant.

(D) Number of Claims and Attachments. All claims and attachments thereto shall be filed in such quantity that one copy may remain on file with the clerk, one copy may be delivered to the claimant and one copy may be served on each defendant. [As amended December 23, 1976, effective January 1, 1977; amended November 21, 1980, effective January 1, 1981; amended November 10, 1988, effective January 1, 1989.]

Small Claims Rule 3

MANNER OF SERVICE

For the purpose of service the notice of claim shall also be considered to be the summons. A copy of the notice of claim shall be served upon each defendant. Service may be made by sending a copy by registered or certified mail with return receipt requested, or by delivering a copy to the defendant personally, or by leaving a copy at the defendant's dwelling house or usual place of abode, or in any other manner provided in Trial Rules 4.1 through 4.16. Whenever service is made by leaving a copy at defendant's dwelling house or usual place of

abode, the person making the service also shall send by first class mail a copy of the notice of claim to the last known address of the person being served. [As amended November 21, 1980, effective January 1, 1981.]

Small Claims Rule 4

RESPONSIVE PLEADINGS

(A) Preservation of Defenses. All defenses shall be deemed at issue without responsive pleadings, but this provision shall not alter the burden of proof.

(B) Entry of Appearance. For the purpose of administrative convenience the court may request that the defendant enter an appearance prior to trial. Such appearance may be made in person, by telephone or by mail but the fact that no appearance is entered by the defendant shall not be grounds for default judgment. [As mentioned December 23, 1976, effective January 1, 1977.]

Small Claims Rule 13

APPOINTMENT OF REFEREE BY CIRCUIT JUDGE

An informative small claims manual shall be formulated by the Judicial Conference of Indiana for distribution to the small claims courts. Each county shall reproduce such manual and shall make it available to every litigant and to such other persons or organizations as the court may deem appropriate. [As amended November 1, 1991, effective January 1, 1992].

Appendix J
Cases

"The plain wording of T.R. 3 is that the filing of a complaint or equivalent pleading commences an action. The Indiana Supreme Court has held "[i]n adopting the rule [T.R. 3] we effectively adopted the Federal rule...and in so doing, we adopted the construction which the Federal Courts have placed on the rule." [citations omitted] *State ex rel Long v. Marion Superior Court Civil Division* [1981] Ind., 418 N.E. 2d 218, 219. Hence we look to the federal case law for assistance in determining whether the statute of limitations is tolled by the filing of a complaint.

[2] Literal compliance with T.R. 3 by filing a complaint commences the cause of action and is sufficient to toll the statute of limitations. [citations omitted]

Nor is the statute of limitations only temporarily tolled pending the exercise of due diligence is serving the summons. There are states which by case law have adopted such a temporary or conditional tolling of the statute of limitations upon filing the complaint and thereafter require the complaintant to exercise due diligence is service of process. These states by statute or court rule require service of summons within a specified number of days after the complaint is filed for tolling of the statute of limitations. Wahl, 583 F. 2d at 287. Indiana does not have statute of case law addressing this particular problem. Like the federal rules, the Indiana Rules of Civil Procedure do not establish a time period within which service of process must be completed in order to toll the statute of limitations. Wahl.

One could argue the provisions of Ind. Rules of Procedure, Trial Rule 4 should be incorporated into T.R. 3, thus tolling the statute of limitations conditional upon the

summons being served with due diligence. We refuse to develop such a rule by judicial fiat in light of the plain, unambiguous, and unconditional language of T.R. 3. If tolling of the statute of limitations was intended to be conditioned upon diligence in service, T.R. 3 could have included appropriate language. ....

Memphis Light

"In an important holding, the United States Supreme Court held that the due process clause is applicable to a termination of service by a municipal utility, and the Court considered the adequacy of notice and the adequacy of a hearing before an identifiable property right or interest could be disturbed by a municipal utility, Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 98 S.Ct. 1554, 56 L.ED. 2d 30 (1978). The Court said that although the notification form and procedure which the utility used were adequate to inform the plaintiffs of the threat of termination of service, it did not advise them that the utility had a procedure by which they might present their objections to their bills and have an opportunity for a hearing on the termination of service question, and that because of those inadequacies, the notice of termination was constitutionally deficient. (1 Harvey, Indiana Practice, p. 78)

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(1) U.S. District Court, N.E. Indiana, South Bend Division

In 1992, Johnson v. Brown, U.S. District Court, N.E. Indiana, South Bend Division (1992) (803 F. Supp. 1414 an Indiana federal court held that a EEOC Title VII action was commenced prior to the expiration of a statute of limitations the complaint was "lodged" with the clerk although Johnson still had not paid the filing fee.

"Thus, Mr. Johnson's complaint should be deemed filed by January 21 at the latest, notwithstanding his failure to pay the filing fee until February 6. Although *Rogers* [790 F. 2d at 1552]
addressed the issue of whether the late payment of fees required by 28 U.S.C.§ 1914 was a jurisdictional bar to bringing suit, it is squarely on point since the language in District Rule 3 (a) is, in pertinent part, identical to § 1914.

Mr. Johnson's case is distinguishable from *Ortiz* [581 F. Supp. at 1261] First, *Ortiz* preceded *Rodgers* and *Gilardi*. Based on *Glardi*, "filing" for statute of limitation purposes is satisfied when a complaint is in the clerk's custody. A district rule should no longer act as a jurisdictional bar. Under Rogers, Mr. Johnson's complaint was timely because it was lodged with the clerk within the extended limitations period. (*Johnson v. Brown*, U.S. District Court, N.E. Indiana, South Bend Division (1992) 803 F. Supp. 1414 at 1418)

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(2) U.S. District Court for the Middle District of Florida

The Indiana Court of Appeals' opinion used this cause of action commenced with the filing of a complaint, and involved the payment of the filing fee for a complaint; in which a U.S. Supreme Court case on payment of an appeals filing fee was used as authority,

[1] We first address the question whether Rodgers' action was properly dismissed for lack of jurisdiction and failure to state a claim upon which relief can be granted. [FN1 ...Thus, to the extent that 'failure to state a claim' goes to the merits of the case, we do not reach it here. It is open to the parties on remand to make such presentations on the merits as may then be appropriate.]
Section 405 (g) states in pertinent part:

Any individual, after any final decision [of a social security claim] of the Secretary [of Health and Human Services] made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. One of the basic cannons of statutory interpretation is that '[a]bsent a clearly expressed legislative intention to the contrary, [the language of the statute] must ordinarily be regarded as conclusive.' Consumer Product Safety Commission v. GTE Sylvanis, Ind. 447 U.S. 102, 108. 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980). We find no expressed intent by Congress to give the word "commenced" any meaning other than that which is given in Fed. R. Civ. P. 3. We therefore hold that an action is commenced within the meaning of § 405(g) when a complaint is filed with the court. See Fed. R. Civ. P. 3; Howard v. Lockheed-Georgia Co. 742, F. 2d 612, 613 (11th Cir. 1984). See also Lyons v. Goodson, 787 F. 2d 411, 412 (8th Cir. 1986); Loya V. Desert Sands Unified School District, 721 F. 2d 279, 281 (9th Cir. 1983).

[2] The Secretary argues that a complaint is not 'filed' until the filing fee required by 28 U.S. C. § 1914 has been paid. We cannot agree. .... (at 1551)

The Supreme Court has held, with respect to 28 U.S.C.A. § 1917, that untimely payment of a filing fee does not vitiate the validity of a notice of appeal. Parissi v. Telechron,Inc. 349 U.S. 46, 75 S. Ct. 577, 99 L. Ed. 46 (1955) (per curiam). We perceive no distinction between § 1917 and § 1914, which requires filing fee for complaints, that would lead to a different conclusion here. Id. at 547. **We therefore hold that a complaint is "filed" for statute of limitations purposes when it is 'in the actual or constructive possession of the clerk,"** Legett V. Strickland, 640 F. 2d 774, 776 (5th Cir. 1981), **regardless of the untimely payment of**

the required filing fee. See also Lyons, at 412, Lopya, 721 F. 2d at 281." (at 1552)

Service of Process ordinarily is not untimely until one hundred twenty days after the filing of a complaint. Fed. R. Civ. P.. 4 (j). Service here was well within that time limit and did not amount to unreasonable delay or contumacious conduct by Rogers. (at 1553)

(*Rodgers v. Bowen*, U.S. District Court of Appeals, Florida, 790 F. 2d 1550 at 1551-1552).

"In the matter of the ESTATE of Edna CRANE, Deceased in the State of Washington:

"The sole issues raised by this appeal is whether timely payment of the superior court clerk's filing fee is a jurisdictional requirement for commencement of a will contest.

....

We found no Washington cases directly on point to aid in interpreting RCW 36.18.020 (12), which is party of the statutes establishing various fees payable to county officials for their authorized acts--including also the auditor, coroner, sheriff, and treasurer. The fees are to be paid into the county treasury. RCW 36.18.140; RCW 36.18.170. Moreover, the county officers are not to perform the service requested unless the appropriate fee is paid. RCW 36.18.060. The chapter also requires the posting of fee schedules, the giving of fee receipts, and the keeping of a fee book. In short, the chapter is intended to provide a uniform method for the collection and disbursement of fees by the various county officials. It does not, however, make mention of requisites to court jurisdiction in any kind of proceedings.

Jurisdiction over a will contest is governed by RCW 11.24.010, which provides in pertinent part as follows: If any person interested in any will shall appear within four months immediately following the probate or rejection thereof, and by petition to the court having jurisdiction contest the validity of said will, or appear to have the will proven which has been rejected, he shall file a petition containing his objections and exception to said will, or to the rejection thereof. If no person shall appear within the time aforesaid, the probate or rejection of such will shall be binding and final. This statute requires simply the Filing of the petition, which in the instant case was accomplished. While it is apparent under RCW 36.18.060 that the clerk's office should have collected the fee and that a new file should have been opened, we believe that the act of filing nevertheless vested jurisdiction over the will contest in the superior court as of the filing date. (*Estate of Crane*, 548 P. 2d 585 at 586).

"As preliminary matters, we note (1) that the statute of limitations provides that an action for personal injuries 'shall be commenced within two years after the cause of action accrued'(Ill. Rev. Stat. 1973, ch. 83, par. 15); (2) that the cause of action here accrued on November 15, 1974; (3) that an action is commenced by the filing of a complaint (Ill. Rev. Stat. 1973, ch. 110, par. 13); and (4) that, therefore, the complaint in this case must have been filed on or before November 15, 1976, in order to comply with the limitation's provision. Further, we take notice that, as a matter of necessary, the clerks of the circuit court delegate to their employees the authority to file documents.

[2] The sole issued to be decided is whether payment in advance of the filing fee is a condition precedent to the 'filing of a complaint,' for the effect of the trial

court's order of dismissal was to hold that it is. Although by statute the fees of the clerk of the circuit court 'shall be paid in advance' (Ill. Rev. Stat., 1973, ch. 53, par. 31), this language has been interpreted to be merely directory, not mandatory, *In Elles v. Industrial Comm.* (1940), 375 Ill. 107, 30 N.E. 2d 615, the plaintiff sought to appeal a decision of the Industrial Commission to the circuit court. However, the plaintiff did not pay the filing fee. The clerk of the circuit court filed the action even though a statute provided that fees of the clerk "shall be paid in advance.' The supreme court held that the statute was merely directory to the clerk and that failure to pay the filing fee did not deprive the circuit of jurisdiction.

.... According the order of dismissal of complaint is reversed, and the cause is remanded for further proceedings." (Hanks v. Floyd, 367 N.E. 2d 483 at 483-484, Ill. App. 3d (1977).

"The initial complaint in this case was actually received by the clerk of the circuit court for filing on April 22, 1986, but returned due to the failure to pay a filing fee. Plaintiffs argue that the failure to pay is irrelevant, and that the operative date for purposes of the statute of limitations in April 22. We agree. Every action is deemed commenced when the complaint is "filed." Fla. R. Civ. P. 1.050. For a complaint to be "filed it is not necessary that the fee be paid, only that the complaint be received by the clerk. See Outboard Marine Domestic International Sales Corp. v. Florida Stevedoring, Corp., 483 So. 2d 823 (Fla. 3d DCA 1986). That delivery occurred in the instant case two days prior to the expiration of the tolled statute of limitations, and, thus, the complaint was timely filed." *Abston v. Bryan*, M.D. Florida (1988), 519 So. 2d 1125 at 1126.

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(6) Illinois lower court filing fee to commence an action:

Ayala v. Goad:
[2] It is well established that the statutory requirement that filing fees be paid in advance is directory rather than mandatory and, therefore, it is not a necessary predicate for the trial court to acquire jurisdiction of a case. (In re Marriage of Sava (1985), 139 Ill. App. 3d 68, 74, 93 Ill. Dec. 483, 488, 486 N.E. 2d 1318, 1323.) Although a filing fee has not been paid the clerk has the authority to file a complaint, and it is now clear that the payment in advance of a filing fee is not a condition precedent to the filing of a complaint for statute of limitations purposes. Hanks v. Floyd (1977), 51 Ill. App. 3d 1048, 1050, 10 Ill. Dec. 95, 96, 367 N.E. 2d 483, 484.
(Ayala v. Goad, Appellate Court of Illinois (1988), 531 N.E. 2d 1040 at 1043)

...We point out that the clerk may refuse to accept a document unless the fee is paid (Ill. Rev. Stat. 1987, ch. 25, Par. 27.1....Where the court becomes aware that the fee has not been paid, it may properly order the fee paid before proceeding with the matter, but the harsh remedy of dismissal with prejudice should be considered only upon plaintiff's noncompliance with an order for payment. See generally Ganja v. Johnson (1972), 6 Ill. App. 3d 701, 703, 286 N.E. 2d 775, 777.
(Ayala v. Goad, Appellate Court of Illinois (1988), 531 N.E. 2d 1040 at 1043)

"The question presented in this case, therefore, is **whether a petition for review is**

timely if it is received in the court of appeals within the six-day period set forth in § 921(c) but is not filed by the clerk until the petitioner has submitted additional copies of the petition and a list containing the names and addresses of counsel for respondent, in compliance with Rule 15(c), **and has paid the docketing fee** or filed a motion to proceed in forma pauperis. We will have jurisdiction if Mrs. Wisneiwski's petition for review properly may be considered filed on June 30, 1988, within sixty days after issuance of the Board's order. If, instead, the petition for review is considered as filed on August 10,1 988, upon Mrs. Wisneiwski's payment of the docketing fee and submission of additional copies of the petition, the petition was untimely and should be dismissed for lack of jurisdiction.

... The payment of filing and docketing fees is not a jurisdictional requirement of Rule 3. *Parissi v. Telechron, Inc.* 349 U.S. 46, 75 S. Ct. 577, 99 L. Ed. 867 ....(Wisniesski v. Director, OWCP, U.S. Dept of Labor (929 F. 2d 952 (1991)

"Equitable filing is fitting where the court has led the plaintiff to believe that he has done everything required of him. Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151, 104 S. Ct. 1723, 1725, 80 L.Ed. 2d 196(1984). Similarly courts have held that equitable tolling is applicable where the county clerk misleads a plaintiff in the filing of his compliant or otherwise errors in the filing process. Gonzalez-Aller Balseyro v. GTE Lunkert, Ind, ... ; see also Bell v. Veteran's Administration Hospital, 654 F. Supp. 69, 70 (W. D. La.) aff'd, 826 F. @d 357 (5th Cir. 1987)

Mr. Johnson's case is distinguishable from *Ortiz* [581 F. Supp. at 1261] First, *Ortiz* preceded *Rodgers* and *Gilardi*. Based on *Gilardi*, "filing" for statute of limitation purposes is satisfied when a complaint is in the clerk's custody. A district rule should no longer act as a jurisdictional bar. Under *Rogers*, Mr. Johnson's complaint was timely because it was lodged with the clerk within the extended limitations period. (Johnson v. Brown, U.S. District Court, N.E. Indiana, South Bend Division (1992) 803 F. Supp. 1414 at 1418)

Appendix K
Other Authority

The disjunctive use of "or" means "or":

> "[6] The words "and" and "or" as used in statutes are not interchangeable, being strictly of a conjunctive and disjunctive nature respectively, and their ordinary meaning should be followed if it does not render the sense of the statute dubious. Sekerez v. Youngstown Sheet & Tube Company, (1975) 166 Ind. App. 563, 337 N.E. 2d 521 (*Barr v. Sun Exploration Co,Inc. v. Barr*, Ind. App., 1982, 436 N.E. 2d 821) .

Also, confer: " The Drafting Manual for the Indiana General Assembly [Drafting Manual] (1976), states ...An 'or' is used to designate when a series is to be read in the disjunctive. The word 'disjunctive' is defined as, 'Designating a conjunction....which denotes an alternative, contract, or opposition between the ideas it connects.' (*Jeffboat, Inc., v. Review Board of the Indiana Employment Security Division*, Ind. App. (1984), 464 N.E. 2d 377 at 378)

" Rule 3 will repudiate the cases holding that the issuance of summons or appearance is jurisdictional for commencement of the action and may not be waived. Cf. Fribe v. Elder, 181 Ind. 597, 105 N.E. 151 (1914); 13 Ind. L. J. 203, 205 (1938).

This provision modifies its counterpart in the federal rules by making it clear that an action in court is commenced by filing not only a complaint, but other similar pleadings used to initiate actions, particularly, special proceedings. For example, claims

against decedent's estate are not filed by complaint or initiated by summons. See Burns' Stat. § 7-802. Also compare Indiana Supreme Court Rule 1-17 adopting the same procedure for claims in receivership proceedings. Judicial review of administrative actions often is initiated by pleadings denominated by other names. E.G., Burns' Stat. , § § 63-3014 ('petition for review'), 53-783 (certiorari from decision of board of zoning appeals). One rule, therefore, will apply to all such court proceedings [emphasis added] except criminal cases.

(Civil Code Study Commission Comments, reprinted in 1 Harvey, supra, p. 60-61)

Indiana Forms of Pleading and Practice (1990), in their analysis of "Commencement of Action":

"[2] Under Federal Rule 3 there is a split in authority as to whether an action is properly commenced without payment of the filing fee, but the **more recent cases hold that payment of the fee is not required for the action to be commenced. Indiana courts should follow the example of the more recent federal cases.[emphasis added]**" (Trial Rule 1, Federal Rule 3.06, Indiana Forms of Pleading and Practice.)

3.07 When is a Complaint "Filed" with the Court?

"Trial Rule 5 provides that the filing of pleading and papers with the court " as required by these rules" shall be made by:
(1)...[in person]
(2) mailing the papers to the clerk by registered or certified mail return receipt requested (in which case filing is complete upon mailing) or
(3)...[with judge]

> The federal courts have been liberal in their construction of what constitutes sufficient delivery to the clerk for the purposes of filing in order to avoid harsh results such as the running of the statute of limitations." [emphasis added](Trial Rule 1, Federal Rule 3.07, Indiana Forms of Pleading and Practice.)

Under Federal Rule 3.08, Trial Rule 1 in Indiana Forms of Pleading and Practice:

> "As noted above an action should be deemed "commenced" when the complaint is filed with the clerk **even though summons has not yet been issued or the filing fees paid.** [emphasis added] What then if a plaintiff refuses or fails to cause summons to be issued to pay the filing fees within a reasonable time after filing the complaint? Under Trial Rule 41, the court is empowered to dismiss the complaint for failure of a party to prosecute the action, comply with the rules or with any order of the court."(Indiana Forms of Pleading and Practice, Trial Rule 1, Federal 3.08).

CONTINGENT FEE CONTRACT

"This agreement, made and entered into this 10th day of February, 1985, by and between the undersigned, Rebecca Boostrom, Client, and Steve C. Bach and Russell S. Armstrong, Attorneys, witnesseth:

Whereas the Client was and is **the owner of the following described real estate** .... [description of real property omitted here]

And whereas the Client has claims against Ray L.Clark and Barbara D. Clark, individually and as husband and wife, and Title Insurance Company of Minnesota for the **unlawful trespass**

and occupation of said real estate by said Clarks.

And whereas the Client wishes to make claims nd if necessary to **take action against said Clarks and said title company and any other responsible parties.**

Now, therefore, it is agreed:

1. **That the Attorneys are empowered and agree to enforce claims** against any parties **for such unlawful trespass and/or occupation of said real estate** and perform all the services, as Attorneys, necessary and appropriate thereto whether by instituting, maintaining **and defending to completion an action** or actions or other legal proceedings, or otherwise; ...

2. As compensation for the said services, by the said Attorneys, the Client will pay to them 40% of anything received or collected on said claim by judgement or judgements obtained thereon....

3. .... [Client will pay costs.]

4. ...[Additional counsel will not increase fee herein]

/s/ Rebecca Boostrom (Signature), Client

/s/ Steve C. Bach (signature), Client
Steve C. Bach, Attorney

Russell S.Armstrong
Russell S. Armstrong, Attorney

(Record, "Complaint," p. 4-5, emphasis added)

Supreme Court, U.S.
FILED
SEP 7 1994
OFFICE OF THE CLERK

(2)

No. 94-182

In The

Supreme Court of the United States

October Term, 1994

REBECCA A. BOOSTROM,

Petitioner,

v.

STEPHEN BACH,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Indiana

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was Rebecca Boostrom denied due process by the Vanderburgh Small Claims Court when a summary judgment hearing was held, even though no summary judgment hearing is required by Ind. Trial Rule 56 and Ind. Trial Rule 73?

2. Is it a denial of due process to require a small claims claimant to pay the filing fee upon filing a small claims complaint?

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No. 94-182

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REBECCA A. BOOSTROM,

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On Petition For Writ Of Certiorari
To The Supreme Court Of Indiana

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is a case of alleged attorney malpractice. Rebecca Boostrom ("Mrs. Boostrom") filed her Complaint in the Vanderburgh Superior Court, the Small Claims Division, on February 5, 1990. (R., p. 3.) Mr. Bach filed a Motion for Summary Judgment on April 24, 1990. (R., p. 128.) In that motion, Mr. Bach argued that the Complaint filed February 5, 1990, was untimely and that Mrs. Boostrom had not been damaged by any alleged act of malpractice. (R., p. 158-159.)

Mrs. Boostrom responded to the motion by filing a Motion to Correct Minutes on May 11, 1990. In this motion, she requested the court to change the date of the

filing of her Complaint from February 5, 1990, to January 12, 1990, for that was the date she alleged she mailed it to the Clerk. She, however, indicated in her Motion to Correct Minutes that she did not pay the required filing fee when she mailed her Complaint to the Court Clerk. (R., pp. 28, 29, 30, 31 and 32.)

On June 4, 1990, Mrs. Boostrom also filed a Response to the statute of limitations argument. (R., p. 35.) She did not, however, respond to the argument that she had not been damaged by any alleged act of malpractice. (R., pp. 35, 36.) June 4, 1990, was the day of the hearing on the Motion for Summary Judgment. Mrs. Boostrom appeared in person and so did Mr. Bach. (R., p. 37.) That same day, the trial court entered summary judgment as follows:

> Comes now the plaintiff, Rebecca Boostrom, in person, pro se, and the defendant, Steve C. Bach, in person, pro se, for hearing on the defendant's Motion for Summary Judgment, and the Court being duly advised in the premises, and having heard the evidence in support of said motion, now finds that there is no genuine issue of material fact regarding this cause of action, and that the law is with the defendant and against the plaintiff on all issues presented by the plaintiff's Complaint and Amended Complaint, and that the defendant is entitled to summary judgment as a matter of law.
>
> IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED that:
>
> 1. This action was filed on February 5, 1990 and was filed more than two years after all alleged acts of malpractice occurred upon which the plaintiff bases her action herein; that the

plaintiff has no valid excuse for not filing her action before said date.

2. That all of the acts alleged in plaintiff's Complaint or Amended Complaint are for malpractice and come within the provisions of Indiana Code § 34-1-2-2(1).

3. That the plaintiff has no claim for breach of contract in her Complaint or Amended Complaint other than for said alleged acts of malpractice and no damages are alleged for breach of contract that are not barred by said statute of limitations.

4. That as a result of this action being barred by said statute of limitations the plaintiff shall take nothing by way of her Complaint or Amended Complaint.

_____

Judge, Vanderburgh Superior
Court, Small Claims Division

Mrs. Boostrom filed a Motion to Correct Errors on June 11, 1990. It was denied without hearing on June 11, 1990. (R., pp. 39, 40, 41 and 42.) Mrs. Boostrom filed a praecipe on July 3, 1990 (R., p. 44), and perfected an appeal.

On April 6, 1992, the Court of Appeals reversed the grant of summary judgment in favor of Mr. Bach. *See Boostrom v. Bach* (1992), Ind.App., 589 N.E.2d 275.

The Indiana Supreme Court accepted transfer of the case and vacated the Indiana Court of Appeals' opinion. *See Boostrom v. Bach* (1993), Ind., 622 N.E.2d 175. It found that the statute of limitations for an attorney malpractice claim in Indiana is not tolled when a complaint is tendered to the clerk but the prescribed filing fee is not.

(Joint Appendix, pp. 3-4.) The Indiana Supreme Court found that there are two purposes behind the statute of limitations. The first is to spare courts from stale claims, and the second is to ensure that defendants are given formal and seasonable notice that a claim is being asserted against them. (Joint Appendix, p. 9.) Requiring that a court cost fee be paid at the time of filing the complaint ensures that a defendant will be given formal and seasonable notice of the claim. (Joint Appendix, pp. 9-10.)

This Petition for Certiorari followed the Indiana Supreme Court opinion.

REASONS WHY THE PETITION SHOULD BE DENIED

1. A Hearing Was Held On The Motion for Summary Judgment.

Mrs. Boostrom argues that she was denied due process since the small claims court of Vanderburgh County, Indiana, did not hold a hearing on Mr. Bach's Motion for Summary Judgment. This is incorrect. The Vanderburgh Small Claims Court did hold a hearing on Mr. Bach's Motion for Summary Judgment. The entry on the Motion for Summary Judgment shows clearly that on June 4, 1990, the parties appeared for a hearing on the Motion for Summary Judgment. It states:

> Comes now the plaintiff, Rebecca Boostrom, in person pro se, and the defendant, Stephen C. Bach, in person pro se, for hearing on the defendant's motion for summary judgment, . . .

(Joint Appendix, p. 36.)[1] (Emphasis added.) There was a hearing on the Motion for Summary Judgment.

While most of the hearing concerned Mrs. Boostrom's Motion to Correct Minutes, the Motion to Correct Mintues was related and pertained to the statute of limitations defense raised by the Motion for Summary Judgment. Even Mrs. Boostrom admits this:

> By the Court: Okay, what is your motion to correct minutes? Explain that to me.
>
> Mrs. Boostrom: Well, this is important because it deals with the statute of limitations.

(Joint Appendix, p. 43.)

A ruling on the Motion to Correct Minutes was dispositive of the Motion for Summary Judgment. If the complaint was not filed until Mrs. Boostrom paid the filing fee, the complaint was filed beyond the statute of limitations. However, if the complaint was filed on the date that it was mailed without payment, then the complaint was filed within the statute of limitations. Mrs. Boostrom knew that in arguing her Motion to Correct Minutes, she was in fact arguing the Motion for Summary Judgment based on the statute of limitations defense:

---

[1] Mrs. Boostrom has filed a Joint Appendix even though there has not been an entry granting the Writ of Certiorari, pursuant to Rule 26.1. Also, no attempt was made by Mrs. Boostrom to permit Mr. Bach to agree on the contents of the appendix pursuant to Rule 26.2. However, since the Joint Appendix was accepted and filed by the court, references will be made directly to that appendix.

Mrs. Boostrom: Well, I thought that I had sent a check, but it doesn't matter. This is the exhibit I would like to file. *You can perfect your claim after you file it.*

Mr. Bach: *No, you cannot. That's the very problem.*

(Joint Appendix, pp. 44-45.):

By the Court: Okay. *The motion to correct minutes would seem to be the prelude to your motion for summary judgment. If, in fact, I denied it, then it would be outside the statute of limitations which would take care of your motion for summary judgment.* I just – I'm trying to determine at this time the filing fee. Mrs. Boostrom, how many cases have you filed in Vanderburgh County, do you know, personally, as a –

Mrs. Boostrom: Well, I use to file some small claims, you know, for eviction and to collect rent and damages.

(Joint Appendix, pp. 61-62.) (Emphasis added.)

Consequently, when the court denied Mrs. Boostrom's Motion to Correct Minutes, it also required the court to grant the Motion for Summary Judgment:

By the Court: Okay, I'll make a determination on that date. Show that the motion to correct minutes is denied; that the filing – the

> record will reflect that Mrs. Boostrom has had numerous contacts with the clerk's office with reference to previous filings in this county and is well aware of the rules requiring a filing fee; that she has stated that no filing fee was filed whatsoever and the January 12th date does not go into effect because even though it was mailed by certified mail, it still was not perfected because there was no filing fee included. *Therefore, the Court determines that the filing date was the date of the second mailing, which falls outside of the statute of limitations which tolled and ended on January 12, 1990. Mr. Bach, you have a motion for summary judgment based upon failure to perfect filing in this suit within the necessary statute of limitations. We'll show the motion for summary judgment is granted and that takes care of the case.*

(Joint Appendix, pp. 70-71.) (Emphasis added.)

Mrs. Boostrom was given a hearing on the Motion for Summary Judgment. She argued that she did not have to pay the filing fee for the complaint to be filed. Mr. Bach argued to the contrary, that the filing was not perfected until the filing fee was paid. The trial court found that the filing was not perfected until the filing fee was paid and,

consequently, the Motion to Correct Minutes was denied and the Motion for Summary Judgment was granted. The two motions went hand-in-hand. Mrs. Boostrom was given an opportunity to be heard. She was accorded due process.

2. The Court Is Not Required To Hold A Hearing On A Motion for Summary Judgment.

Nothing in Indiana Trial Rule 56 requires a hearing to be held on a motion for summary judgment. Indiana Trial Rule 73 makes clear that the court need not hold a hearing on a motion for summary judgment:

> (A) **Hearings Upon Motions**. . . . To expedite its business the court may direct the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition, or direct or permit hearings by telephone conference call with all attorneys or other similar means of communication.

Ind. Trial Rule 73(A). In this case, the Vanderburgh Small Claims Court could have merely directed the submission and determination of the Motion for Summary Judgment without oral hearing upon the Brief in Support of Motion for Summary Judgment submitted by Mr. Bach, and upon Mrs. Boostrom's Motion to Correct Minutes. No hearing was necessary.

Ind. Trial Rule 73 is based upon Federal Rule of Civil Procedure 78, which states in pertinent part:

> To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral

> hearing upon brief written statements of reasons in support and opposition.

Fed.R.Civ.P. 78. Many federal courts have found that oral arguments are not necessary in deciding motions for summary judgment: *Geear v. Boulder Community Hospital*, 844 F.2d 764 (10th Cir. 1988); *Allied Chemical Corp. v. Mackay*, 695 F.2d 854 (5th Cir. 1983); *Barker v. Norman*, 651 F.2d 1107 (5th Cir. 1981); *McMillan v. Rock Mart*, 653 F.2d 907 (5th Cir. 1981); *Spark v. Catholic University of America*, 510 F.2d 1277 (D.C. Cir. 1975); *Parish v. Howard*, 459 F.2d 616 (8th Cir. 1972); *Twin City Constr. Co. v. United States*, 515 F.Supp. 767 (D.N.D. 1981); *Rhodus v. Dumiller*, 552 F.Supp. 425 (M.D. La. 1982).

No hearing was necessary on Mr. Bach's Motion for Summary Judgment since the issues of law addressed by the Vanderburgh Small Claims Court could adequately have been decided by a review of Mr. Bach's Brief in Support of Motion for Summary Judgment, Mrs. Boostrom's response to the motion, and by review of Mrs. Boostrom's Motion to Correct Minutes. Nonetheless, as indicated in the previous section, a hearing was held on the motion. There was no violation of due process.

3. It Is Not A Denial Of Due Process To Require That A Small Claims Filing Fee Be Paid Upon The Filing Of A Complaint.

A. Mrs. Boostrom Had Actual Notice That She Was Required To Pay The Filing Fee Upon Commencement Of The Action.

Prior to discussing the substantive law applicable to this issue, it is important to point out that Mrs. Boostrom

knew that a small claims filing fee was required to be paid upon the filing of a complaint. Throughout her petition, she argues that the Indiana Supreme Court imposed a new requirement, one of which she was not aware. She claims that herself, a layman, lacked notice of this requirement since it was not contained in any Indiana statute or rule. This is a misstatement. Mrs. Boostrom had, on numerous occasions, filed small claims complaints in Vanderburgh Small Claims Court. Each time, she paid the filing fee with the complaint. The following testimony at the hearing on the Motion for Summary Judgment indicates that Mrs. Boostrom was well aware of the procedure she was required to follow when filing a small claims complaint:

The Court:	. . . Mrs. Boostrom, how many cases have you filed in Vanderburgh County, do you know, personally, as a –
Mrs. Boostrom:	Well, I use to file some Small Claims, you know, for eviction and to collect rent and damages.
By the Court:	Alright, you've filed an estimate of how many cases on your own, without an attorney?
Mrs. Boostrom:	I don't know, just for rent and damages, I don't know. *I can't remember, at least six.*
By the Court:	Okay, and then in some other cases that you've had up there in the past few years, other

than the rent and damage cases?

Mrs. Boostrom: I haven't filed any cases recently.

By the Court: Since January of 1989, have you filed any cases, other than this one?

Mrs. Boostrom: I haven't had to file any rent and damage cases for a long time down here.

By the Court: Any other type of case? Any other type of case at all?

Mrs. Boostrom: Well, I countersued Mr. Sheets. That was in 1988.

Mr. Bach: You have a case against Mr. Hatfield, too, don't you?

Mrs. Boostrom: Yes, I filed that at the time that I filed against you since you two never got my case settled.

(Joint Appendix, pp. 62-63.) Mrs. Boostrom filed at least six other small claims cases before filing this one against Mr. Bach. While Mrs. Boostrom is a layman,[2] she knew the procedure to be followed in filing small claims cases in Vanderburgh Small Claims Court.

---

[2] Mrs. Boostrom is a very educated layman. She is an english teacher. She has a master's degree and, at the time of the hearing on the Motion for Summary Judgment, she was in the process of receiving her Ph.D. (Joint Appendix, pp. 58-59.)

The trial court made this express finding in its order:

> By the Court: Okay, I'll make a determination on that date. Show that the motion to correct minutes is denied; that the filing – *the record will reflect that Mrs. Boostrom has had numerous contacts with the clerk's office with reference to previous filings in this county and is well aware of the rules requiring a filing fee; . . .*

(Joint Appendix, pp. 70-71.) (Emphasis added.) Mrs. Boostrom had actual notice in this case of the requirement of a filing fee. There was no denial of due process.

B. Mrs. Boostrom Is Not Claiming She Could Not Afford To Pay The Fee, She Merely Forgot.

This is not a case where Mrs. Boostrom is asserting that she could not afford to pay the filing fee. She eventually paid the filing fee and admitted to the court that she merely forgot to mail a check when she mailed the small claims complaint:

> By the Court: Oh, you hadn't sent in anything, is that right?
>
> Mrs. Boostrom: I didn't pay any attention to it, *I just sent the money order 'cause a lot of people require you to send a money order, not a check.*
>
> By the Court: In paragraph 4 of your motion to correct minutes, it says the deputy clerk wrote to me and requested a money order, not a check, for the filing fee.

Mrs. Boostrom: Uh-huh.

By the Court: Did you send a check in originally?

Mrs. Boostrom: Well, then later I looked 'cause I wanted –

By the Court: Yes or no, did you send a check?

Mrs. Boostrom: – to see if I had and I looked in my checkbook register and I couldn't find any record that I had sent a check, *so I don't think I did 'cause I couldn't find a record that I did. But at the time, I thought that I had.*

By the Court: So no money was sent in at all on January 12th?

Mrs. Boostrom: Well –

By the Court: No filing fee at all?

Mrs. Boostrom: – I thought that I did, but then when I looked back later in case that it came up if I had any proof that I did, I couldn't find anything in my checkbook register, so I don't have any proof that I did.

(Joint Appendix, pp. 67-68.) This is not a case where a small claims claimant could not afford to pay the filing fee; Mrs. Boostrom merely forgot.

C. The Indiana Legislature Has For 43 Years Required That The Filing Fee Be Paid Upon Commencement Of The Action.

It has been the law in Indiana for forty-three (43) years that the filing fee must be paid when the small claims complaint is filed. After defining what the costs consist of, Ind. Code § 33-11.6-4-15 states:

> *The docket fee and the costs for the initial service of process shall be paid upon the institution of each case.* The cost of service rendered subsequent to the initial service shall be assessed and paid after such service has been made, and the cost of witness fees shall be paid before the witnesses are called.

Ind. Code § 33-11.6-4-15 (West's Supp. 1990) (Emphasis added). Ind. Code § 33-11.6 specifically applies to small claims courts.

While the Vanderburgh Superior Court's small claims docket is not a small claims court as defined by I.C. 33-11.6, the Indiana Legislature has required prepayment of certain fees, including a docket fee and the service of process fee in all civil actions filed in circuit or superior courts since 1949. *See* Compiler's Note to Ind. Code § 33-1-9-1 (Burns 1975). A review of the legislative history shows this to be true.

In 1973, the applicable statute stated in pertinent part:

> **33-1-9-1 [49-1305a]. Payment when action instituted - Docket fee - Clerk's service fee - Refunds - Exceptions.**

> (a) *Upon the institution of any civil action or proceeding,* whether by original process, removal or otherwise in any circuit, superior or probate court, there shall be paid by the party or parties so instituting such action or proceeding the sum of Nineteen Dollars [$19.00], Seven Dollars [$7.00] of which shall constitute a docket fee payable to the State of Indiana, and which said docket fee now required by law to be taxed by clerks of circuit courts for any action in any circuit, superior or probate court wherein there is a plaintiff and defendant, except as hereinafter set out; . . .

I.C. 33-1-9-1 (Burns 1975) (Emphasis added.). This statute was repealed by Acts 1978 P.L. 2, § 3308, Acts 1982, P.L. 181. *See* Compiler's Note I.C. 33-1-9-1 (Burns Supp. 1991). It was replaced by I.C. 33-1-9-1.1.

In 1982, Ind. Code § 33-1-9-1.1 stated in pertinent part:

> (a) *Upon the institution of a civil action,* whether by original process, removal, or otherwise in a circuit, superior or probate court, the party or parties instituting the action shall pay Twenty-Three Dollars ($23). . . .

I.C. 33-1-9-1.1 (West's 1983) (Emphasis added.). This statute was repealed by P.L. 171-1984, § 80. It was replaced by Ind. Code § 33-17-3. *See* Historical Note to I.C. 33-1-9-1.1 (West's Supp. 1991).

Ind. Code § 33-17-3, however, also required the payment of fees upon commencement of the action. As stated by Ind. Code § 33-17-3-2:

> *The clerk shall charge and collect the following fees upon the commencement of a civil action* in probate or municipal court or on the plenary docket of a circuit, superior or county court: . . .

See I.C. 33-17-3-2 (Burns 1985) (Emphasis added). I.C. 33-17-3-5 provided exceptions to the prepayment rule. It stated:

> The prepayment of the court fees specified in Section 2 [33-17-3-2] of this Chapter is not required in:
>
> 1. Appeals of civil matters from courts of lesser jurisdiction than circuit court;
>
> 2. Adoption proceedings; and
>
> 3. Proceedings for the appointment of guardians.

I.C. 33-17-3-5 (Burns 1985). It should be noted that I.C. 33-17-3-6 specifically required the clerk to collect, "upon the commencement of a civil action on the small claims docket of a circuit, superior or county court", a judicial salary fee, a county docket fee, which included payment for service of process by registered or certified mail, and the cost of publishing any notices. *See* I.C. 33-17-3-6 (Burns 1985).

Effective July 1, 1987, I.C. 33-17-3 was repealed. *See* Compiler's Notes to I.C. 33-17-3-1 (Burns Supp. 1991). It was replaced by Ind. Code § 33-19-3; however, it is clear from I.C. 33-19-3 that the legislature's intent was to require prepayment of fees except in limited circumstances. Not coincidentally, those limited circumstances were the same as those previously stated in Ind. Code

§ 33-17-3. For example, in Ind. Code § 33-19-3-4, the legislature states:

> The prepayment of fees under this Chapter is not required in appeals of civil matters to circuit courts from courts of inferior jurisdiction.

This same exception is identified in former Ind. Code § 33-17-3-5(1). Also, in current Ind. Code § 33-19-4-1, two other exceptions to prepayment of fees are specified:

> Prepayment of fees is not required in proceedings for:
>
> 1. Adoption; or
>
> 2. The appointment of a guardian.

I.C. 33-19-4-1 (West's Supp. 1991). Not coincidentally, these two exceptions to prepayment are also specified in former I.C. 33-17-3-5(2) and (3). It has been the law in Indiana for 43 years that the filing fee be paid upon commencement of the action.

There are legitimate state interests involved in requiring payment of the filing fee before filing the complaint. If prepayment were not required, frivolous and multiple actions could be filed without the state being able to collect for the burden on its court system. The only remedy in such a case would be dismissal on motion of the defendant after the system had already been abused by a litigious party:

> Essentially the legal question here is whether the state may limit access to its civil courts by the requirement of a filing fee – -Where the right has been granted by the legislature it may be conditioned on the payment of a modest filing fee because of the legitimate interest of the State

> in financial support of the courts and in discouraging frivolous appeals by those able to pay as well as those unable to pay.

Frederick v. Schwartz, 296 F.Supp. 1321, (D. Conn. 1969). There are legitimate state interests involved in requiring a filing fee be paid upon commencement of the action. It is not a denial of due process.

D. The Indiana Supreme Court Merely Interpreted Indiana Common Law.

In its opinion, the Indiana Supreme Court was merely interpreting Indiana's common law:

> We grant transfer to consider whether the statute of limitations is tolled when a complaint is tendered to the clerk, but the prescribed filing fee is not. We hold that it continues to run.

(Joint Appendix, pp. 3-4.) The Indiana Supreme Court found that the statute of limitations exists not only to spare courts from stale claims, but to ensure that the defendant is given formal and seasonable notice that a claim is being made:

> On the other hand, the statute of limitations exists not only to spare courts from stale claims, *Matter of M.D.H.* (1982), Ind.App., 437 N.E.2d 199, but also "to ensure that parties are given formal and seasonable notice that a claim is being asserted against them." *State ex rel. Young v. Noble Circuit Court* (1975), 263 Ind. 353, 359, 332 N.E.2d 99, 103.

(Joint Appendix, p. 9.)

The Supreme Court found that tendering the filing fee is relevant to this latter objective of providing the defendant with formal and seasonable notice of the claim. Consequently, a notice of claim or complaint is not filed unless the filing fee is paid:

> Tendering the prescribed court costs fee is relevant as to this latter objective. C.F. Ind. Code Ann. § 33-19-3-5 (West Supp. 1992) (costs fee include costs of initiating service of process). Therefore, while we agree that "the filing of the complaint will toll the statute of limitations," Civil Code Study Commission, Comments to Trial Rule 3, reprinted in one William F. Harvey, *Indiana Practice* 60 (2d Ed. 1987), we also conclude that a notice of claim or complaint is not filed unless the filing of the fee and the notice/complaint have occurred by any of the means permitted by T.R. 5(E).
>
> Such an approach is consistent with the modern notion that the commencement of an action occurs when the plaintiff presents the clerk with the documents necessary for commencement of suit. . . .

(Joint Appendix, pp. 9-10.) The Indiana Supreme Court merely interpreted what is necessary under Indiana law to toll the statute of limitations for an attorney malpractice claim.

E. This Is Not A Case Which Merits The Review Of This Court.

1. There was no competent, admissible evidence submitted by Rebecca Boostrom in opposition to the Motion for Summary Judgment.

The trial court's grant of summary judgment could have been affirmed on other state law grounds. Mr. Bach filed his Motion for Summary Judgment on April 24, 1990. On May 11, 1990, Mrs. Boostrom filed a Motion to Correct Minutes requesting that her Complaint be file-stamped on January 12, 1990, instead of February 5, 1990. This Motion to Correct Minutes was not a verified motion. It was not sworn to in any way. The exhibits attached to the Motion to Correct Minutes were also not authenticated or sworn to in any way, and Mrs. Boostrom was not under oath on June 4, 1990, when the court heard both motions. Mrs. Boostrom, therefore, submitted no competent evidence in opposition to the Motion for Summary Judgment. *See Freson v. Combs* (1982), Ind.App., 433 N.E.2d 55; *Funk v. Funk* (1990), Ind.App., 563 N.E.2d 127, 132; *Conard v. Waugh* (1985), Ind.App., 474 N.E.2d 130, 135-136; *McMahon v. SnapOn Tool Corp.* (1985), Ind.App., 478 N.E.2d 116, 122, n.4.

The Indiana Rules of Evidence apply with equal force to cases in small claims court. The Indiana Trial Rules govern small claims proceedings to the extent that they are not inconsistent with the small claims rules. *Muenich v. Gulden* (1991), Ind.App., 579 N.E.2d 665, 666; *Frank H. Monroe Heating & Cooling, Inc. v. Rider* (1983), Ind.App., 450 N.E.2d 1056, 1057. The Indiana Court of Appeals has

specifically concluded that Trial Rule 56 and summary judgments are applicable to small claims courts. *Bedree v. Sandler & Sandler* (1981), Ind.App., 426 N.E.2d 707, 708. As stated by the Indiana Court of Appeals in *Bedree*:

> Nothing in the Indiana Rules for Small Claims prohibits either party from filing a motion for summary judgment or the trial court from ruling on such a motion. Bedree argues that Small Claims Rule 8 is such a prohibition. However, Small Claims Rule 8 concerns itself with the informality of the actual hearing or trial.
>
> Until a change is made in the Indiana Rules of Procedure, motions for summary judgments may be granted in small claims court actions. The granting of a summary judgment, however, is only proper when there is no genuine issue of material fact. (Citations omitted.)

426 N.E.2d at 708. In *Bedree*, the defendant argued that Small Claims Rule 8(A) prevented Trial Rule 56 from applying in small claims court. Small Claims Rule 8(A) provides:

> The trial shall be informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law, and shall not be bound by the statutory provisions or rules of practice, procedure, pleadings or evidence except provisions relating to privileged communications and offers of compromise.

The Court of Appeals in *Bedree* held that this rule applied only to the actual hearing or trial. 426 N.E.2d at 708. The same conclusion was reached by the court in

Muenich v. Gulden, where the Court of Appeals determined that Small Claims Rule 8(A) "sets forth the procedure to be followed in the small claims *trial* itself." 579 N.E.2d at 667. (Emphasis added.)

Mrs. Boostrom was required to oppose the Motion for Summary Judgment with actual evidence. She was required to authenticate or certify her exhibits and she was required to submit testimony in verified form as required by Trial Rule 56. Since she did not do so, summary judgment against her was proper.

2. Mr. Bach presented uncontroverted evidence that the withdrawal of his representation of Mrs. Boostrom in the underlying lawsuit was accomplished without adverse effect to her.

An action for attorney negligence in Indiana is comprised of four elements: (1) employment of the attorney; (2) failure of the attorney to exercise ordinary skill and knowledge; (3) damage; and (4) the negligence must be the proximate cause of the damage. *Bailey v. Martz* (1986), Ind.App., 488 N.E.2d 716; *Fiddler v. Hobbs* (1985), Ind.App., 475 N.E.2d 1172. Here, Mr. Bach presented uncontroverted evidence that his withdrawal of representation for Mrs. Boostrom in the underlying action was completed without adverse effect to Mrs. Boostrom. The trial court allowed his withdrawal of representation finding, pursuant to Indiana Rule of Professional Conduct 1.16(b), no adverse effect to Mrs. Boostrom.

In her Complaint, Mrs. Boostrom alleged that she was damaged in three ways. She claimed that she was unable to obtain legal representation on a contingency

contract, that she suffered the loss of her claim for conversion, and she claimed that she suffered the loss of her claim for punitive damages. (R. 22.) The trial court's motion permitting Mr. Bach to withdraw disposed of all of these claims. (R. 131.)

At the time of Mr. Bach's withdrawal, he, on behalf of Mrs. Boostrom, was pursuing both a claim of conversion and a punitive damages claim. (R. 141-143, 150-151.) Mrs. Boostrom was still able to pursue these claims after Bach's withdrawal and, in fact, attorney Steven Sheets entered an appearance for Mrs. Boostrom on April 14, 1988. (R. 137.) Thus, there was no adverse effect to Mrs. Boostrom.

At the very least, on the basis of this evidence, Mrs. Boostrom was required to come forward with some evidence which would demonstrate that she had been damaged. Ind. Trial Rule 56(E). As demonstrated above, she came forward with no competent evidence and absolutely no evidence with regard to the issue of damage. The summary judgment in favor of Mr. Bach could have been affirmed on this basis as well.

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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NO. 94-182

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

REBECCA A. BOOSTROM,
Petitioner,

--v.--

STEPHEN BACH,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is due process denied in a Small Claims court when Summary Judgement is granted when the court does not state it is hearing the Defendant's Motion for Summary Judgement, does not have oral argument,does not receive evidence, and asks only the defendant, an attorney representing himself, two questions in legal terminology about his allegations on the statute of limitations during the time the court stated it was hearing a motion filed by the Plaintiff, pro se.

2. Does the Indiana Supreme Court's first impressions opinion interpreting a Small Claims Rule to create a new requirement that paying a Small Claims filing fee is a prerequisite to commence a Small Claims action a denial of due process by lack of notice of the law by rule to unrepresented Small Claims plaintiff(s) who follow all the many detailed requirements in said rule.

LIST OF PARTIES

Petitioner, Rebecca Boostrom

Respondent, Stephen Bach

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OTHER AUTHORITY

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and Practice (1990) 5

NO. 94-182

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--v.--

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

REPLY TO BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The *Respondent's Brief in Opposition*, pursuant to U.S. Supreme Court Rule 15.1, does not point out any perceived misstatements of the Petitioner in her Statement of the Case.

The *Respondent's Brief*, Statement of the Case, p. 1, omits stating that the complaint was mailed by certified mail to the clerk on January 12, 1994. J.A. 34. The Indiana Supreme Court's opinion stated the complaint was

mailed by certified mail (J.A.) and also "filed"(J.A. 11.n.2) on January 12, 1988.

The *Respondent's Brief*,p.1,misrepresents[1] the Motion to Correct Minutes, filed under T.R. 60 (A) and T.R. 5 (E) (R. p. 28-32).

The *Respondent's Brief*,p.2, misrepresents that Ms. Boostrom did not file a response regarding damages. On April 2, 1990, she had filed a "More Detailed Statement" (R.12-22); on June 4, 1990, "Plaintiff's Response to Damages Issue in Motion for Summary Judgement" (R.,p. 68) and "Petition to File a Verified Amended Complaint" (R. 33). These filings were not heard.

The *Respondent's Brief*, p. 2,3, has an invalid printing of the submitted written entry of summary judgement (J.A. 38) by omitting Bach's handwriting dating it June seventh, 1988, and his signature as composer.

The Respondent omits the two petitions for rehearing and rulings. Cf. *Pet'r Br.*,7-10.

---

[1] However, a grant of the Motion to Correct Minutes would have precluded the need to hear evidence on the accrual date Bach alleged as his only defense.

REASONS WHY THE PETITION SHOULD BE GRANTED

REPLY TO BRIEF IN OPPOSITION ON PETITIONER'S QUESTION TWO[2] PRESENTED FOR REVIEW

In Indiana Small Claims Rule 2 (J.A. 73-74), the language is unambiguous, plain and clear. The Indiana Supreme Court based its interpretation (J.A. 6) on only part (A), while ignoring the clear description of the contents of (A) found in part (B).[3]

---

[2] The reply in support of the two questions in the Petition for Writ of Certiorari are presented here in reverse order.

[3] Indiana Rules of Court (1990). Indiana Small Claims Rule 2: COMMENCEMENT OF ACTION.

(A) In General. An action under these rules shall be commenced by the filing of an unverified notice of claim in a court of competent jurisdiction.

(B) Form of Notice of Claim. The notice of claim shall contain:

(1) The name of the court;

(2) The name, address and telephone number of the claimant and defendant(s);

(3) The place, date and time when the parties are to appear for trial of the claim, which date shall not be less than ten [10] days nor more than forty [40] days after service of said notice of claim;

(4) A brief statement of the nature and amount of the claim and (a) If the claim arises out of written contract, a copy shall be attached; however, the fact that a copy of such contract is not in the custody of the plaintiff shall not bar the filing of the claim; (b) If the claim is on account, an itemized statement shall be attached;

(5) A statement that the parties may appear either in person or by an attorney;

(6) An instruction to the defendant that the defendant should bring to the trial all documents in the possession of or under the control of the defendant concerning the claim;

(7) A statement that if the defendant does not

A Small Claims plaintiff should file certain listed items to commence an action. Nowhere does the rule provide that a filing fee must be paid to commence an action. The Indiana Supreme Court's interpretation of an unambiguous Small Claims rule by creating a new rule through interpretation is contrary to the law of statutory construction.

Respondent's Issue # 3 (A): " Mrs. Boostrom Had Actual Notice That She Was Required To Pay The Filing Fee Upon Commencement Of The Action " (Resp't Br., p. 9).

In none of the statements Bach quotes does Ms. Boostrom state when she paid the filing fee previously or indicate she knew from the prior eviction and rent and damages actions that (a) a filing fee had to be

---

wish to dispute the claim he may nonetheless appear for the purpose of allowing the court to establish the method by which the judgement shall be paid;

(8) The name, address and telephone number of the person designated by the court with whom the defendant may communicate if defendant is unable to appear at the time or place designated in the notice;

(9) A statement that a default judgment may be entered against the defendant if he fails to appear for trial; and

(10) Notice of the defendant's right to a jury trial and that such right is waived unless a jury trial is requested within ten [10] days after receipt of the notice of claim; and

(11) Any additional information which may facilitate proper service. [As amended November 10, 1988, effective January 1, 1989.] (J.A.73-74)

paid upon commencement of the action ; (b) when commencement of an action occurs; (c) exactly when a filing fee has to be paid; or (d) the consequences of any "late" payment of a filing fee. Moreover, in eviction actions, a statute of limitations is not at issue.

Bach mislabels as a finding the court's reasoning that: she "is well aware of the rules requiring a filing fee." But a perusal of the transcript will show she never mentioned the controlling rule, Ind. Sm.C. R. 2, but argued from an Indiana authority interpreting T.R. 3 (J.A. 45, 46, 50, 56, 57).

Respondent's Issue # 3 (B) correctly states that Ms. Boostrom forgot to pay the filing fee. Her situation is comparable to that in *Brady v. Eastern Indiana Production Credit Assoc.*, 396 N.E. 2d, where the Indiana Supreme Court (1978) decided that the filing fee for appeals and original actions filed in the Indiana appellate courts may be paid late. She also argued from that caselaw without knowing its title (J.A. 53-54,R.100).

In the *Respondent's Brief*, Bach does not

dispute the account in the *Petition for Writ*, p. 15, of the failure of the Vanderburgh County courts to comply, prior to 1994, with Ind. Sm.C. R. 13 (J.A. 75) to publish a Small Claims manual of the rules and make it available to each litigant.

Respondent's Issue # E (C): "The Indiana legislature has for 43 years required that the filing fee be paid upon commencement of the action" (*Resp't Br.*, p. 14).

Bach does not cite any Indiana caselaw, and fails to cite or quote Ind. Code Ann. § 33-19-5-5 which the transfer opinion stated was controlling in this cause. J.A. 8, n.1.

The transfer opinion stated the controlling statute was not dispositive:

> "neither this provisions nor the raft of other statutes cited by the parties is dispositive of the issue before us." (Boostrom vs. Bach, 622 N.E. 2d 175, n. 1

The Ind. Supreme Court's opinion relied solely on Small Claims Rule 2 (A) and T.R. 5 (E). The dissent corroborates that the majority's opinion is dispositively based on "rules" (J.A. 13).

Respondent's Issue # 3 (D) : "The Indiana Supreme Court Merely Interpreted Indiana Common Law." (Resp't Br., p. 18).

Indiana, being a code state, does not have common law. Bach quotes at length the undisputed issue of the need to serve summons, but in Indiana the complaint is not filed when the summons is served. In contrast, an Alabama's Small Claims Rule E requires the complaint to be served before it is filed.[4]

Finally, Bach by implication argues that the Ind. Supreme Court's opinion is erroneous in stating Ms. Boostrom filed her complaint by certified mail on January 12, 1988. Bach contends: "The Indiana Rules of Evidence apply with equal force in small claims courts"(*Resp't Br.* p. 20). Bach is disproven by Indiana Supreme Court (1986) on "relaxing of the formal rules of evidence in small claims cases" in *State ex Re. Adams* v. *Hendricks Circuit Ct.*,497 N.E. 2d 549, 547. Also, cf.§ 33-5-2-1 *et seq.* (Burns 1985); and Small Claims Rule 8 (A). (J.A. 27-28).

Notice requirements to the general public

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[4] Alabama Small Claims' Rule E. Code of Alabama (1975), Vol. 23 1984 Replacement Volume, Vol. 23 1990 Replacement Volume, updated with 1993 Cumulative Supplement, Annotated.

for utility services are analogous to notice requirements to the general public in Small Claims courts. *Memphis Light, Gas and Water Division v. Craft*, 98 S. Ct. 1554 (1978). Without redress of injustice, some cannot pay utility bills.

The plain and clear simple English in Ind. Small Claims Rule 2 should enable any person to file the necessary papers, according to the Ind. legislature in Ind. Code § 33-11.6-4.6 (1990) (quoted in J.A. 28-29). The Ind. Supreme Court composed Ind. Sm. C. R. 2 and chose not to include a filing fee when considering the general public's situation. Any person cannot be required to do more than the law requires. *BFP v. Resolution Trust Corp*, U.S. Supreme Court (1994), 114 S. Ct. 1757; *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *TWA v. Franklin Mint Corp*, 466 U.S. 243, 262; *Delta Air Lines, Inc. v. August*, 450 U.S. 346(1981);and *Pipefitters Local Union No. 562 v. U.S.*, 407 U.S. 382. Statutory construction should be applied to Indiana Small Claims Rule 2 for due notice of law.

REPLY TO BRIEF IN OPPOSITION ON
PETITIONER'S QUESTION ONE PRESENTED FOR REVIEW

1. Granting the Petition for a Writ might help set standards for Small Claims courts. A motion for summary judgement hearing is more foreign to a typical Small Claims unrepresented party than an agency hearing in which a person might be unrepresented.

2. The right to a due process hearing on substantive rights in a judicial proceedings is protected by the U.S. Constitution. On the right to be heard, *Logan v. Zimmerman Brush Co. et al.*, U.S. Supreme Court (1981) stated:

" ... the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]." *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)

455 U.S. 422 at 380. To be noted, the Petitioner has always agreed that the courts need statutes of limitations and filing fees.

2. Indiana law requires a due process hearing on a motion for summary judgement.

The *Resp't Br.*, p. 8, argues no hearing is required; however, Bach made no such argument in his Indiana briefs. The law from only other jurisdictions, which he cites, does not control in Indiana.

Bach's argument can be found in *Otte v. Tessman* (1980)in which the Ind. Court of Appeals held: "Although the party against whom a motion for summary judgement is directed should have an opportunity to oppose such motion, it is not necessary in all cases that a formal hearing be scheduled and conducted." 412 N.E. 2d 1223, 1225-26. On transfer, the Ind. Supreme Court vacated the opinion of the Court of Appeals and remanded with instruction to set a time for a hearing on the motion for summary judgement pursuant to Tr. R. 56(C). *Otte v. Tessman*, 426 N.E. 660 at 661-662,Ind. Supreme Court (1980). Ind. T.R. 56 (C) used in *Otte* was in effect in 1990 in this case.

Bach relied on the provision of T.R. 73. However, the Indiana Supreme Court reinforced *Otte* in *Rumfelt v. Himes*, 438 N.E. 2d 980,

982-983 by stating that T.R. 73 is a general rule that does not control over a specific rule requiring a hearing, such as Ind. T.R. 56 (C) in *Otte* or Ind. T.R. 41(E) in *Rumfelt*.

The T.R. 56(C) requirement for a mandatory hearing has been overwhelmingly affirmed in ten (10) on-point opinions on summary judgements, following the Indiana Supreme Court decision in *Otte*. Effective since 1991, the Ind. Supreme Court amended Ind. T.R. 56 (C) to more explicitly state: "The court shall conduct a hearing on the motion which shall be held not less than ten (10) days after the time for filing the response." 1990 amendment.

Only after the Indiana Supreme Court decided *Otte* in 1980, did the Ind. Court of Appeals rule in 1981 that motions for summary judgement can be filed and heard in Ind. Small Claims courts. Cf. *Resp't Br.*, p. 21.

Reply to Respondent's Brief, p. 4-8:
"1. A Hearing Was Held On The Motion for Summary Judgement." (*Ibid.*, p. 4)

When the hearing opened (J.A.40-41) and

the Small Claims court might have intended to announce what motions it would try to hear that day, Bach entered into a long digression (J.A. 42; R 76-86). After that, the court considered Ms.Boostrom's request: "Could we at least correct the Court minutes first so we can get something on the record for all my time and expense in coming..." (J.A. 42; emphasis added). The court appeared to agree: "BY THE COURT: What's the need for correction? Okay, the Motion to Correct Minutes--." (J.A. 42). Bach interrupted and argued he wanted the petition to transfer heard first, but "if she wants to submit it on the merits" then he was in favor of the Motion to Correct Minutes being heard. The court appeared to state it was narrowing down consideration to only her motion and asked her: "Okay, specifically, what is it that we're talking about." (J.A. 43) and for a second time asked her to explain her motion; then she responded:" Well, it's just to correct the file date ..." (J.A.44; emphasis added). Her reply clearly shows her

Motion to Correct Minutes was based on technical grounds per T.R. 5 (E) and T.R. 60 (A), and it was not the sole defense to Bach's motion. Her exact reply "specifically" stated nothing about the statute of limitations.

The court stated it was hearing her motion, but never stated it was considering Bach's motion. J.A 42-43. Her motion was physically before the court: "BY THE COURT: Okay, I have a copy of it. I have found it." J.A. 44. Even though Boostrom's motion was the only one physically presented to the court, the resultant court action was on Bach's.

99 % to 1 % Ratio: The transcript has ninety-nine percent (99%) of its contents on other matters and one percent (1 %) on two questions by the court to only Bach about his motion (Cf. R. Tr. p. 97, ln. 3-20; J.A. 97). Bach agreed in his *Respondent's Brief*, p. 5, "...most of the hearing concerned Mrs. Boostrom's Motion to Correct Minutes...." By the court handling the disposition of the case as it did, Boostrom was denied a meaningful

hearing and opportunity to make any other defenses to Bach's motion.

In his *Respondent's Brief*, p. 5, Bach argued that the hearing of the Motion to Correct Minutes precluded any need for him to present his Motion for Summary Judgement. The ruling assumed the filemark date of the complaint was Ms. Boostrom's only defense against Bach's motion. J.A. 61-62. *Armstrong v. Manzo*, U.S. Supreme Court (1962), states:

> "A fundamental requirement of due process is the opportunity to be heard.[citation omitted]. It is an opportunity which must be granted *at a meaningful time and in a meaningful manner.*"

380 U.S. 545 at 552 (emphasis added). Bach, an attorney, did not present his motion in an orderly and meaningful way so that Boostrom as an unrepresented party could have understood his motion and presented a meaningful defense. Bach presented no oral argument, no exhibits, and no testimony during the hearing. If he had, then Ms. Boostrom would have been on notice his motion was being considered.

On June 4, 1990, Ms. Boostrom had filed

two responses to Bach's motion: "Plaintiff's Response to Damages Issue in Motion for Summary Judgement" (R.,p. 68) and "Plaintiff's Response to Statute of Limitations Issue in Motion for Summary Judgement" (Cf. R.p. 35) which were never heard and were ignored by the court. The error of record of the small claims court that Ms. Boostrom filed no response to Bach's motion for summary judgement except the Motion to Correct Minutes was carried over and repeated in various Indiana opinions.

After the court had asked several personal questions of the Plaintiff, Bach tried to present his motion, Ms. Boostrom objected (R. Tr.p.108,ln. 4-10), and the court stopped Bach. "I just--I'm trying to determine at this time [emphasis added] the filing fee." (R. Tr.p. 108, ln. 98).

At the end of a sustained hearing on her "Motion to Correct Minutes," Bach again tried to present his Motion for Summary Judgement, and Boostrom strongly objected. It appeared the court agreed to her request:

"MS. BOOSTROM: But I don't want the Motion for Summary--
BY THE COURT: --and he's trying to answer me.
MS. BOOSTROM: -- Judgement to be heard until we determine this date.
BY THE COURT: Okay, I'll make a determination on that date."
(Record, Tr., p. 116, ln. 3-8)

Based on the court's statement, Ms. Boostrom expected a future hearing in which she could respond to Bach's motion. The court's ruling simultaneous on two motions surprised her, as the court had indicated it would rule on her motion *before* hearing Bach (R.,p.116-117).

The Respondent's Brief, p. 22: "Mr. Bach presented uncontroverted evidence that the withdrawal of his representation of Mrs. Boostrom in the underlying lawsuit was accomplished without adverse effect to her."

On the contrary, Bach presented no evidence. Bach did not present into evidence the withdrawal order, yet he bases his whole current argument on it. Bach apparently came prepared to file exhibits, since he filed Defendant's Exhibit No. 1 from an estate in which Ms. Boostrom was an heir. Bach proffered no exhibits. The transcript shows that damages were unheard. Also see the Court

of Appeals rehearing opinion, section III, stating damages were not heard. J.A.30-33. The Indiana Supreme Court did not address damages.

Also, the Respondent argues the Indiana Supreme Court opinion interpreted Indiana malpractice law (*Resp't Br.*, p. 18-19), but therein no malpractice law is cited to be interpreted. Malpractice accrual occurs when the breach meets damages, not when a contract is breached. Cf. Indiana malpractice law in *Shideler v. Dwyer*, 417 N.E. 2d 281, Ind. App. (1981), upheld and discussed by the Ind. Supreme Court in *Barnes v. A.H. Robins*, Ind. 476 N.E. 2d 84 (Ind. 1985); and *Johnson v. Cornett*, Ind. App. (1985), 474 N.E. 2d 518. See also the ABA/BNA Code 301:908 on accrual. By Indiana malpractice law, damages during representation occurred on August 5, 1991, the final judgement date in the underlying cause.

The U.S. Supreme Court in *Fuentes v. Shevin* (1972) 407 U.S. 67 at 80, 87, stated:

> "...The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing."

Ms. Boostrom does not need to show she would prevail to be entitled to a hearing. By Small Claims Rule 4(A) Preservation of Defenses, J.A. 75, all defenses are preserved until a hearing. However, her defenses include:

1) The accural date is the date of final judgement in the underlying cause. See above.

2) There is no evidentiary basis for the Ind. Supreme Court's statement that January twelfth, 1990 was "the same day the statute of limitations was to run on her right of action." In addition, on January 12th, 1988, Bach was still actively representing Ms. Boostrom (Docket, Entry of Service to Bach on 1-12-88 R.136), and he didn't file his motion to withdraw until a week later on January 19, 1988 (R. p. 135). Where services were rendered under an entire continuous contract, Ind. law is well-established[1] the statute does not begin to run until when the services cease *and* damages meet the breach of contract.

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[1] *Little v. Smiley*, 9 Ind. 116 (1857), *Schoonover v. Vachon*, 22 N.E. 777(1889); *Story v. Story*,27 N.E. 573 (1891); *Taggart v. Tevanny*, 27 N.E. 511(1891).

3) There is equitable estoppel for a filemark date of February 5, 1988 because on January 12, 1988 by certified mail Ms. Boostrom put her telephone number on her complaint: "*Phone: (812)339-9332*" (R, p. 6). The Clerk failed to call her collect, but wrote to request a money order and did not state that the complaint wasn't filed (R.32).

4) The "discovery" rule and concealment of a cause of action (I.C. 34-1-2-9) are defenses for any January, 1988 accrual date.

5) "The doctrine of equitable estoppel may bar a party from reliance on defense of statute of limitations." *Barnd v. Borst*, 431 N.E. 2d 161 (Ind. App. 1982). (A) Bach did not file his representation contract on January 19, 1988, so he is estopped to use that date. (B) Bach failed to give the required advance notice to his client by local rule 5 (J.A. 72) prior to the hearing date when her contractual interests were involved. (C) The order approving withdrawal was entered nunc pro tunc to January 19, 1988 without the required

notification under Ind. T.R. 72 (D) and the hearing requirement of the Supreme Court of Indiana in *Stowers v. State*, 363 N.E. 2d 978 at 983.

CONCLUSION

For all the above reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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